THE LAW OF NATIONS

AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE

BY

J. L. BRIERLY

SECOND EDITION

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PREFACE TO FIRST EDITION

ANY intelligent study of the problems of international relations must raise the question of the role, if any, to be assigned in them to law. Unfortunately current discussions of the matter too often assume that this question can be determined by *a priori* methods, to the neglect of any serious examination either of the part that law is actually playing in the relations of states today, or of the conditions upon which an effective legal order in any society depends. This method of approach to the law of nations has made possible two popular misconceptions about its character: one that it exists solely or mainly in order to make war a humane and gentlemanly occupation, from which some critics deduce the futility of the whole science, and others the supreme need for devising a system of overwhelmingly powerful 'sanctions'; the other that, inasmuch as law within a state is normally an instrument of peace, nothing but the wickedness of governments prevents us from recognizing the law of nations as a mighty force by which war might be 'outlawed' immediately from international relations.

In this small book I have tried to give reasons for my belief that the law of nations is neither

a chimera nor a panacea, but just one institution among others which we have at our disposal for the building up of a saner international order. It is foolish to under-estimate either the services that it is rendering to-day, or the need for its improvement and extension.

J. L. B.

OXFORD,
February, 1928.

PREFACE TO SECOND EDITION

THIS book has been revised and in part re-written. But it retains its character of an introductory book, intended either for the student beginning the study of international law or for the layman whose interest in international affairs may lead him to inquire what part law is capable of playing in that field.

J. L. B.

OXFORD,
December, 1935.

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I

THE ORIGIN AND CHARACTER OF INTERNATIONAL LAW

§ 1. *The Rise of Modern States and of the Doctrine of Sovereignty.*

THE Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another. Rules which may be described as rules of international law are to be found in the history both of the ancient and medieval worlds; for ever since men began to organize their common life in political communities they have felt the need of some system of rules, however rudimentary, to regulate their inter-community relations. But as a definite branch of jurisprudence the system which we now know as international law is essentially modern, dating only from the sixteenth and seventeenth centuries, for its special character has been determined by that of the European state system, which was itself shaped in the ferment of the Renaissance and the Reformation. Some understanding of the main features of this modern state system is therefore necessary to an understanding of the nature of international law.

For the present purpose what most distinguishes the modern post-Reformation from the medieval state is the enormously greater strength and concen-

tration of the powers of government in the former. The national and territorial state with which we are familiar to-day in Western Europe, and in countries which are founded on, or have adopted, Western European civilization, is provided with institutions of government which normally enable it to enforce its control at all times and in all parts of its dominions. This type of state, however, is the product of a long and chequered history; and throughout the Middle Ages the growth of strong centralized governments was impeded by many obstacles, of which difficulties of communication, sparcity of population, primitive economic conditions, are obvious illustrations. But two of these retarding influences deserve special notice because of the imprint which they have left even to this day on the modern state.

The first of these was feudalism. Modern historical research has taught us that, while it is a mistake to speak of a feudal *system*, the word 'feudalism' is a convenient way of referring to certain fundamental similarities which, in spite of large local variations, can be discerned in the social development of all the peoples of Western Europe from about the ninth to the thirteenth centuries. Bishop Stubbs, speaking of feudalism in the form it had reached at the Norman Conquest, says:

'It may be described as a complete organization of society through the medium of land tenure, in which from the king down to the lowest landowner all are bound together by obligation of service and defence: the lord

to protect his vassal, the vassal to do service to his lord; the defence and service being based on and regulated by the nature and extent of the land held by the one of the other. In those states which have reached the territorial stage of development, the rights of defence and service are supplemented by the right of jurisdiction. The lord judges as well as defends his vassal; the vassal does suit as well as service to his lord. In states in which feudal government has reached its utmost growth, the political, financial, judicial, every branch of public administration is regulated by the same conditions. The central authority is a mere shadow of a name.'[1]

Thus to speak of a feudal 'state' is really a misuse of terms; for a feudal organization of society was a substitute for its organization in a state, and a perfectly feudal condition of society would be not merely a weak state, but the negation of the state altogether. Such a condition was never completely realized at any time or anywhere; but it is obvious that the tendency to disperse among different classes those powers which in modern times we regard as normally concentrated in the state, or at any rate as under the state's ultimate control, had to pass away before states in our sense could come into existence.

On the other hand there were elements in the feudal conception of society capable of being pressed into the service of the unified national states which were steadily being consolidated in Western Europe from about the twelfth to the sixteenth centuries,

[1] *Constitutional History of England*, vol. i, p. 274.

and influential in determining the form that those states would take. Thus when its disintegrating effects on government had been eliminated, the duty of personal loyalty of vassal to lord which feudalism had made so prominent was capable of being transmuted into the duty of unquestioning allegiance of subject to monarch in the national state; the intimate association of this personal relationship with the tenure of land made the transition to *territorial* monarchy easy and natural; and the identification with rights of property of rights which we regard as properly political led up to the notions of the absolute character of government, of the realm as the 'dominion' or property of the monarch, and of the people as his 'subjects' rather than as citizens. Feudalism itself had been an obstacle to the growth of the national state, but it left a legacy of conceptions to its victorious rival which strongly emphasized the absolute character of government.

The other influence which retarded the growth of states in the Middle Ages was the Church. It is not necessary here to speak of the long struggle between Pope and Emperor, although one incidental effect of this was to assist the growth of national states by breaking up the unity of Christendom. More significant in the present context is the fact that never until after the Reformation was the civil authority in any country regarded as supreme. Always governmental authority was divided; the Church claimed and received the obedience of those

who were also the subjects of the state, even in matters far beyond the purely spiritual sphere. Even in England, always somewhat restive under papal interference, the idea of the omni-competence of the civil power would have been unthinkable. Men might dispute exactly how far the powers of each of the rival authorities extended; but that there were limits to the power of the state, that the Church had *some* powers over the members of the state which it neither derived from, nor held by the sufferance of, the state, was certain. States might often act as arbitrarily as any absolute state of the post-Reformation world; they might struggle against this or that claim of the Church; but neither in theory nor in fact were they absolute. But just as the state was gradually consolidating its power against the fissiparous tendencies of feudalism within, so it was more and more resisting the division of authority imposed upon it by the Church from without; and this latter process culminated in the Reformation, which in one of its most important aspects was a rebellion of the states against the Church. It declared the determination of the civil authority to be supreme in its own territory; and it resulted in the decisive defeat of the last rival to the emerging unified national state. Over about half of Western Europe the rebellion was completely and evidently successful; and even in those countries which rejected Protestantism as a religion, the Church was so shaken that it could no longer compete with the state as a political force. The Peace of

Westphalia, which brought to an end in 1648 the great Thirty Years War of religion, marked the acceptance of the new political order in Europe.

The new order led naturally to a new theory of the nature of the state, the theory of 'sovereignty', first perhaps explicitly stated by Jean Bodin in his *De republica*, published in 1576. According to Bodin it was of the essence of every state that there should exist within it a central force, which was the sole source of laws, but was not itself bound by them; '*majestas est summa in cives ac subditos legibusque soluta potestas*'. This *majestas* or sovereignty was not necessarily vested in an individual monarch, though Bodin thought it best that it should be; theoretically it might equally well be in a minority of the citizens, when the state would be an aristocracy, or in a majority, when it would be a democracy. In Bodin himself the full rigour of the theory was mitigated by being combined with the medieval doctrine of the law of nature; his sovereign, though not bound by the law of the land, was bound by divine law, by the law of nature, and also by the laws of nations. Further he held, though rather inconsistently with his main doctrine, that even some laws of the state were so fundamental that the sovereign might not alter them; but these mitigations of the theory disappeared in later political speculation. The whole theory was essentially a deduction from the political facts existing at the time of its formulation, which have been shortly described above. Everywhere in Western Europe unified national states

were emerging out of the loosely compacted and limited states of medieval times. Everywhere too, the civil authority of government was decisively establishing its supremacy over the ecclesiastical and every other rival claimant of power, and the process was taking the form of the rise of strong personal monarchies. The doctrine exactly expressed these, the most conspicuous, facts in the political aspect of Europe at the end of the sixteenth century; but it never expressed the whole truth, and the truth that it expressed was not an eternal one. It was not the whole truth because even in the age of European absolutism which followed in the seventeenth and eighteenth centuries, no monarch's power was ever wholly without limitations; and its truth was not eternal, because, as we now know, the age of absolutism was only a temporary phase in European history.

The implications of such a theory in a world in which different states have to live in relations with one another were full of portent, for it led logically to the assertion of the complete separateness and irresponsibility of every state. It gave the death-blow to the lingering notion that Christendom, in spite of all its quarrels, was in some sense still a unity, and left the relations between states not only uncontrolled in fact, as they had often been before, but uninspired by any unifying ideal. For the first time the state seemed to have become the final goal of unity. Machiavelli's *Prince*, written in 1513, though it did not formulate a theory, is a relentless analysis of

the art of government based on this conception of the nature of the state, as an entity absolutely self-sufficing and non-moral. But, fortunately, at the very time when European political development seemed about to justify the whole theory of sovereignty, other causes were at work which were to make it impossible for the world to accept the absence of any bonds between state and state which was its logical consequence, and to show that the new national states, so far from being destined to live in isolation from one another, would be brought into far more intimate and constant relations than in the days when their theoretical unity was accepted everywhere.[1] Among these causes may be mentioned (1) the impetus to commerce and adventure caused by the discovery of America and the new route to the Indies; (2) the common intellectual background created by the Renaissance; (3) the sympathy which co-religionists in different states felt for one another, creating a loyalty which transcended the boundaries of states; and (4) the common feeling of revulsion against war, caused by the savagery with which the wars of religion were waged. All these causes co-operated to make it certain that the state, such as the theory of sovereignty conceived it, could never in reality become the final and perfect form of human association, and that in the modern as in the medieval world it would be necessary to recognize the existence of a wider unity. The rise of inter-

[1] Cf. Westlake, *Collected Papers*, p. 55.

national law was the recognition of this truth; for in a sense it may be regarded as a protest against the full implications of the doctrine of sovereignty. It accepted the abandonment of the medieval ideal of a world-state and took instead as its fundamental postulate the existence of a plurality of states, secular, national, and territorial; but it denied their absolute separateness and irresponsibility, and held that they were bound to one another under the supremacy of law. Thus it reasserted the medieval conception of unity, but in a form which took account of the new political structure of Europe.

§ 2. *The Influence of the Doctrine of the Law of Nature.*

Though the system of international law is essentially modern, it had, like the modern state itself, a medieval foundation. Bodin, as we have seen, qualified the full effect of his new doctrine of the state by holding that even a sovereign is bound by the law of nature; and it was out of the conception of such a law that the early writers on international law developed their systems. Modern legal writers, especially in England, have sometimes ridiculed the conception of a law of nature, or they have recognized its great historical influence but treated it as a superstition which the modern world has rightly discarded. Such an attitude, however, proceeds from a misunderstanding of the medieval idea; for under a terminology which has ceased to be familiar to us the phrase stands for something which no progressive system of law either does or can discard. Some know-

ledge of what a medieval writer meant by the term is necessary if we would understand either how international law arose, or how it develops to-day.

A long and continuous history,[1] extending at least as far back as the political thought of the Greeks, lies behind the conception; but its influence on international law is so closely interwoven with that of Roman law that the two may here be discussed together. The early law of the primitive Roman city-state was able to develop into a law adequate to the needs of a highly civilized world empire, because it showed a peculiar capacity of expansion and adaptation which broke through the archaic formalism which originally characterized it, as it characterizes all primitive law. In brief, the process of expansion and adaptation took the form of admitting side by side with the *jus civile*, or original law peculiar to Rome, a more liberal and progressive element, the *jus gentium*, so called because it was believed or feigned to be of universal application, its principles being regarded as so simple and reasonable that it was assumed they must be recognized everywhere and by every one. This practical development was reinforced towards the end of the Republican era by the philosophical conception of a *jus naturale* which, as developed by the Stoics in Greece and borrowed from them by the Romans, meant, in effect, the sum of those principles which ought to control human conduct, because founded in the very nature of man as a rational and social being.

[1] Cf. Pollock, *Essays in the Law*, ch. ii.

In course of time *jus gentium*, the new progressive element which the practical genius of the Romans had imported into their actual law, and *jus naturale*, the ideal law conforming to reason, came to be regarded as generally synonymous. In effect, they were the same set of rules looked at from different points of view; for rules which were everywhere observed, i.e. *jus gentium*, must surely be rules which the rational nature of man prescribes to him, i.e. *jus naturale*, and vice versa. Medieval writers later developed this conception of a law of nature, sometimes elaborating it in ways which appear to the modern mind both fanciful and tedious; but so powerful had its influence on men's minds become, that the Church was impelled to give it a place in the doctrinal system, and St. Thomas Aquinas, for example, taught that the law of nature was that part of the law of God which was discoverable by human reason, in contrast with the part which is directly revealed. Such an identification of natural with divine law necessarily gave the former an authority superior to that of any merely positive law of human ordinance, and some writers even held that positive law which conflicted with natural law could not claim any binding force.

The effect of such a conception as this, when applied to the theory of the relations of the new national states to one another is obvious; for it meant that it was not in the nature of things that those relations should be merely anarchical; on the contrary they must be controlled by a higher law, not the mere creation of the will of any sovereign,

but part of the order of nature to which even sovereigns were subjected. Over against the theory of sovereignty, standing for the new nationalistic separation of the states of Europe, was set the theory of a law of nature denying their irresponsibility and the finality of their independence of one another. No doubt it was impossible to point to any authentic text of this law, and different interpretations of it were possible; but the belief that in spite of all appearance, the whole universe, and included in it the relations of sovereigns to one another, must be ruled by law, remained. Moreover, the difficulty of discovering the dictates of this law presented itself to a medieval writer with much less force than it does to the modern mind. For he had in fact a special guide ready to his hand in Roman law.

The position of Roman law in Europe in the sixteenth century has an important bearing on the beginnings of international law. There were some countries, such as Germany, in which a 'reception' of Roman law had taken place; that is to say, it had driven out the local customary law and had been accepted as the binding law of the land. In other countries the process had not gone so far as this; but even in these the principles of Roman law were held in great respect and were appealed to whenever no rules of local law excluded them. Everywhere in fact Roman law was regarded as the *ratio scripta*, written reason; and a medieval writer, seeking to expound the law of nature had only to look about him to see actually operative in the world a system

of law which was the common heritage of every country, revered everywhere as the supreme triumph of human reason. Moreover, this law had a further claim to respect from its close association with the Canon law of the Church.

Thus Roman law reduced the difficulty of finding the contents of natural law almost to vanishing point; and in fact the founders of international law turned unhesitatingly to Roman law for the rules of their system, wherever the relations between states seemed to them to be analogous to those of private persons. Thus, for example, the rights of a state over territory, especially when governments were almost everywhere monarchical and the territorial notions of feudalism were still powerful, bore an obvious resemblance to the rights of an individual over property, with the result that the international rules relating to territory are still in essentials the Roman rules of property. It is not difficult, therefore, to see how the belief in an ideal system of law inherently and universally binding on the one hand, and the actual existence of a cosmopolitan system of law everywhere revered on the other, should have led to the founding of international law on the law of nature. We have to inquire further, however, whether this foundation is valid for us to-day.

The medieval conception of a law of nature is open to certain criticisms. In the first place, when all allowances have been made for the aid afforded by Roman law, it has to be admitted that it implied a belief in the rationality of the universe which seems

to us to be exaggerated. It is true that when medieval writers spoke of natural law as being discoverable by reason, they meant that the best human reasoning could discover it, and not, of course, that the results to which any and every individual's reasoning led him was natural law. The foolish criticism of Jeremy Bentham: 'a great multitude of people are continually talking of the law of nature; and then they go on giving you their sentiments about what is right and what is wrong; and these sentiments, you are to understand, are so many chapters and sections of the law of nature,'[1] merely showed a contempt for a great conception which Bentham had not taken the trouble to understand. Medieval controversialists might use arguments drawn from natural law to support almost any case, but there was nothing arbitrary about the conception itself, any more than a text of Scripture is arbitrary because the Devil may quote it. But what medieval writers did not always realize was that what is reasonable, or, to use their own terminology, what the law of nature enjoins, cannot receive a final definition: it is always, and above all in the sphere of human conduct, relative to conditions of time and place. We realize, as they hardly did, that these conditions are never standing still. For us as for them, a rational universe, even if we cannot prove it to be a fact, is a necessary postulate both of thought and action; and the difference between our thought and theirs is mainly that we

[1] *Principles of Morals and Legislation*, ch. ii.

have different ways of regarding the world and human society. When a modern lawyer asks what is reasonable, he looks only for an answer that is valid now and here, and not for one that is finally true; whereas a medieval writer might have said that if ultimate truth eludes our grasp, it is not because it is undiscoverable, but because our reasoning is imperfect. Some modern writers have expressed this difference by saying that what we have a right to believe in to-day is a law of nature *with a variable content.*

In the second place, when medieval writers spoke of natural law as able to overrule positive law in a case of conflict, they were introducing an anarchical principle which we must reject. But this was a principle which died hard, and even in the eighteenth century Blackstone could write: 'This law of nature being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding all over the globe in all countries and at all times; *no human laws are of any validity, if contrary to this.*'[1] In Blackstone, however, such words were mere lip-service to a tradition, and had no effect on his exposition of the law. To hold, however, that unreasonableness can invalidate a rule of law is to confuse the function of legislation with that of ascertaining what existing law is. Law could never perform its proper function of a controlling force in society if courts of law did not hold themselves bound to subordinate their own ideas of what is reasonable to an assumed superior

[1] *Commentaries on the Laws of England*, Introduction.

reasonableness in the law; that assumption may not always be well founded, but it is necessary to our social security that it should be acted upon until the law is altered.

These are valid criticisms, but they do not affect the permanent truths in the conception of a law of nature, and though to-day we generally use a different terminology, we recognize the validity of those truths as fully as ever. For one thing the law of nature stands for the existence of *purpose* in law, reminding us that law is not a meaningless set of arbitrary principles to be mechanically applied by courts, but that it exists for certain ends, though those ends may have to be differently formulated in different times and places. Thus where we might say that our aim is to embody social justice in law (giving to that term whatever interpretation is current in the thought of our time), a medieval thinker might have said that the validity of positive law must be tested by its conformity or otherwise to a law of higher obligation, the law of nature. Natural law, therefore, or a like principle under some other name, is an essential underlying principle of the art of legislation. But that is not all; it is also a principle that is necessarily admitted into the actual administration of law. This is so because the life with which any system of law has to deal is too complicated, and human foresight too limited, for law to be completely formulated in a set of rules, so that situations perpetually arise which fall outside all rules already formulated. Law cannot and does not refuse to solve a problem because it is

new and unprovided for; it meets such situations by resorting to a principle, outside formulated law, whose presence is not always admitted. In fact it falls back on the solution which the court or the jury think to be reasonable in all the circumstances. Even a slight acquaintance with the working of the English Common law shows it perpetually appealing to reason as the justification of its decisions, asking what is a reasonable time, or what is a reasonable price, or what a reasonable man would do in given circumstances. We do not suppose that our answers to those questions will be scientific truths; it is enough if they are approximately just; but on the other hand we do not attempt to eliminate this test of reasonableness by substituting fixed rules, because it would be impossible to do so. But this appeal to reason is merely to appeal to a law of nature. Sometimes, indeed, English law still uses the term 'natural justice', and our courts have to do their best to decide what 'natural justice' requires in particular circumstances; for example, in 1924 the Northern Rhodesia Order in Council, providing for the administration of that protectorate, enacted that in civil cases between natives Rhodesian courts were to be guided by native law as far as applicable and *not repugnant to natural justice*. The Rhodesian courts will probably experience no difficulty in interpreting this instruction.

'The grandest function of the law of nature', Sir Henry Maine has written, 'was discharged in giving birth to modern international law';[1] and even if

[1] *Ancient Law*, ch. iv.

such a foundation had not been a sound one, no other would have been possible in the sixteenth century. Afterwards, in the seventeenth and eighteenth centuries, the medieval tradition of a law to which man's rational nature bids him everywhere and always to conform came to be distorted, and later writers used the term to denote more especially the law under which men were supposed to have lived in a *state* of nature, that is to say, in a supposed pre-political condition of human society. But before considering this development and its unfortunate effects on international law it will be convenient to say something of the men whose writings first gave that law systematic form.

§ 3. *The classical writers on International Law.*

The recognition of international law as a separate object of study may be dated from the latter part of the sixteenth century. Earlier writers had written on some of the topics which fall within modern international law, especially on the usages of war and on the treatment of ambassadors; but they did not always separate the legal from the theological and ethical, or the domestic from the international, aspects of such questions. Thus side by side with questions such as whether war is ever justified, what causes for going to war are lawful and what unlawful, what means of waging war are permissible, and the like, they discussed questions of tactics, of military discipline, or of the duties of a vassal to help his lord, without feeling that they were treating together topics which properly

belonged to different subjects. Theological writers especially were concerned with the perplexing ethical problems to which the practice of warfare gives rise, and a series of great Spanish Churchmen of the fifteenth and sixteenth centuries made important contributions to the progress of thought on these matters. Perhaps the greatest of these was Franciscus de Victoria, Professor of Theology at Salamanca from 1526 to 1546, whose *Relectiones theologicae*, published after his death, contained, in two courses of lectures, the *Relectiones De Indis* and the *De jure belli Hispanorum in Barbaros*, an examination of the title of the Spaniards to exercise domination over the inhabitants of the New World which is remarkable for its courageous defence of the rights of the Indians, and for the humanity of its views on war. The work of these early Spanish writers has been unfairly neglected, especially in Protestant countries, but in quite recent years interest in them has been revived and a more just appreciation of their importance is now accorded to them.

Alberico Gentili, commonly known as Gentilis, an Italian Protestant who fled to England to avoid persecution and became professor of Civil Law in Oxford, was perhaps the first writer to make a definite separation of international law from theology and ethics and to treat it as a branch of jurisprudence. 'Let theologians hold their peace', he writes, 'in work that belongs to others than they.' His most important work was the *De jure belli* published in 1598. To this book, Gentilis's more famous successor, Hugo de Groot, or Grotius, was, as he himself admitted, greatly indebted,

but otherwise it appears to have exercised little influence, and the very name of Gentilis was almost forgotten until recent times.

Grotius was born in Holland in 1583, and died in 1645, and he has been traditionally regarded as the founder of international law, a title which does some injustice to the merits of his predecessors. Even as a boy he acquired a European reputation for learning, and as a man he became master of every subject to which he turned his interest. He was a lawyer, a historian, a poet, as well as a theologian whose great desire was to see the reunion of the Christian Church. Yet he lived the life, not of a student, but of a man of affairs, practising the law and serving in official positions. He became involved in a quarrel arising out of the Arminian heresy, a quarrel nominally theological but really turning on the political question whether the provinces of Holland should form a loose federal union or be consolidated under the House of Orange. Grotius supported the former and the losing cause. He was imprisoned for over two years, escaped by the devotion of his wife in a box supposed to contain books, and eventually became ambassador of Sweden at the French Court.

Grotius wrote two works on international law, the *De jure praedae* in 1604, and the *De jure belli ac pacis* in 1625. The former of these, in which he supported the claim of the Dutch East India Company to the capture of a prize from the Portuguese, was never published by him, and was not discovered until 1864. It was then found that a short work which he published anony-

mously in 1609, the *Mare liberum*, contending, in opposition to the claims of the Portuguese, that the open sea could not be appropriated by any state, had been written as one of the chapters of the *De jure praedae*.

Few books have won so great a reputation as the *De jure belli ac pacis*. This was not wholly due to the merits of the book itself, though they are great; it was partly due to the time and circumstances of its publication. When he wrote it in 1625 Grotius was already so eminent that anything from his pen would have attracted attention. Further, he had the advantage of belonging to the country which in the seventeenth century was in many ways the leading country in Europe. The successful war of liberation by the Dutch against Spain in the previous century had heralded the rise of the modern state system; it had been the first great triumph of the idea of nationality, and the successful assertion of the right of revolt against universal monarchy. In the seventeenth century they were the leaders of European civilization, teaching to other countries not only new methods of commerce but new conceptions of government based on freer institutions and on some measure of religious toleration. When the issue between absolutism and liberty was still doubtful in England, and when everywhere else absolutism was triumphant and destined to remain so until the French Revolution, the Dutch had settled the issue in their own country in favour of liberty. Even some of the qualities which render the book tedious to a modern reader, especially its

voluminous citation of authorities from ancient history and the Bible, and its excessively subtle distinctions, commended it to the taste of contemporaries still familiar with the tradition of scholasticism.

Grotius's purpose was practical. He wrote on the laws of war because, as he says:

'I saw prevailing throughout the Christian world a licence in making war of which even barbarous nations should be ashamed; men resorting to arms for trivial or for no reasons at all, and when arms were once taken up no reverence left for divine or human law, exactly as if a single edict had released a madness driving men to all kinds of crime.'[1]

In contrast with this anarchy he proclaimed that even states ought to regard themselves as members of a society, bound together by the universal supremacy of justice. Man, he said, is not a purely selfish animal, for among the qualities that belong to him is an *appetitus societatis*, a desire for the society of his own kind, and the need of preserving this society is the source of natural law, which he defines as:

'The dictate of right reason, indicating that an act, from its agreement or disagreement with the rational and social nature of man, has in it moral turpitude or moral necessity, and consequently that such an act is either forbidden or commanded by God the author of nature.'[2]

Besides being subject to natural law, he says, the relations of peoples are subject to *jus gentium*; for just as in each state the civil laws look to the good of the state, so there are laws established by consent which

[1] *Prolegomena*, 28. [2] Book I, ch. i, 10 (1).

look to the good of the great community of which all or most states are members, and these laws make up *jus gentium*. It is obvious that this is a very different meaning from that which the term bore in the Roman law; there, as we have seen, it stood for that part of the *private* law of Rome which was supposed to be common to Rome and other peoples; whereas in Grotius it has come to be a branch of *public* law, governing the relations between one people and another. It is important, Grotius tells us, to keep the notions of the law of nature and the law of nations (to adopt a mistranslation of *jus gentium* which its new meaning makes almost necessary) distinct; but he is far from doing so himself. Nor was it possible for him to do so, as is apparent from his own statement of how their respective contents are to be discovered. He used, he tells us, the testimony of philosophers, historians, poets, and orators, not because they were themselves conclusive witnesses, but because when they were found to be in agreement, their agreement could only be explained in one of two ways: either what they said must be a correct deduction from the principles of reason, and so a rule of the law of nature; or else it must be a matter in which common consent existed, and so a rule of the law of nations. Thus in effect the two terms, as we have already seen, still express the theoretical and the practical sides of the same idea.

Like all thinkers who try to understand the meaning and bases of law, Grotius had to meet the perennial and plausible arguments of those who would identify justice with mere utility. His answer was clear and

convincing. Justice, he said, is indeed the highest utility, and merely on that ground neither a state nor the community of states can be preserved without it. But it is also more than utility, because it is part of the true social nature of man, and that is its real title to observance by him.

Grotius's work consisted in the application of these fundamental principles to war; for he says:

'It is so far from being right to admit, as some imagine, that in war all rights cease, that war ought never to be undertaken except to obtain a right; nor, when undertaken, ought it to be carried on except within the bounds of right and good faith. . . . Between enemies those laws which nature dictates or the consent of nations institutes are binding.'[1]

The first book, therefore, inquires whether war can ever be *justum*, lawful or regular; and as Grotius was of opinion that one requirement necessary to make a war lawful was that it should be waged under the authority of one who held supreme power in the state, he was led to inquire into the nature of sovereignty. His treatment of this subject was confused and unsatisfactory, partly because for practical reasons it was necessary for him, writing when he did, to admit the lawfulness of wars waged by princes who were sometimes far from being independent. In the second book he dealt with the causes of wars, and in effect reduced the causes of lawful wars to two, the defence of person or property and the punishment of offenders. He then proceeded to examine such questions as what

[1] *Prolegomena*, 25, 26.

constitutes the property of a state, for example, how far the sea may do so, how property is acquired and lost, and other questions which a modern writer would either place under the international law of peace, or exclude from international law altogether. In the third book he dealt with topics which fall under the modern laws of war, that is to say, with the question what acts are permissible and what are forbidden in the conduct of war. Here his plan was not only to state the strict laws of war, but to add what he called *temperamenta*, alleviations or modifications designed to make war more humane.

It is usual in estimating the work of Grotius to speak of its remarkable and instantaneous success; and if it is a proof of success that within a few years of its author's death his book had become a university text-book, that it has often since been appealed to in international controversies, that it has been republished and translated scores of times, and that every subsequent writer treats his name with reverence, however widely he may depart from his teaching, then Grotius must be accounted successful. But if by success is meant that the doctrines of Grotius as a whole were accepted by states and became part of the law which since his time has regulated their relations, then his work was an almost complete failure. It is true that some of his doctrines have since become established law. For instance, the doctrine that the open sea cannot be subjected to the sovereignty of any state, and many of the *temperamenta* of war that he suggested have been incorporated into international law; but these

particular changes were due at least as much to changes in the character of navigation and in the technique of war respectively as to Grotius. At the heart of his system lay the attempt to distinguish between lawful and unlawful war; he saw clearly that international order is precarious unless that distinction can be established, just as national order would be precarious if the law within the state did not distinguish between the lawful and the unlawful use of force. Yet this distinction never became part of actual international law; and even in the theory of the subject it was retained by most of Grotius's successors more as an ornament to their theme than as a doctrine in which they seriously believed. Finally it disappeared even from theory, and international law came frankly to recognize that all wars are equally lawful. As the most authoritative of modern English writers on the subject says:

'International law has no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights.'[1]

It was not until the foundation of the League of Nations in 1919 that any real attempt was made to falsify this confession of weakness and to embody in actual law the cardinal principle of Grotius's system.

[1] W. E. Hall, *International Law*, 8th ed., p. 82.

Grotius supplied then, not a system of law, but a philosophy of inter-state relations which could be set against Machiavelli's brutal description of those relations as they often were, and he is great enough to dispense with the undiscriminating adulation which is often showered upon him. This adulation has done disservice to international law by encouraging a servile imitation of his methods. It was natural that Grotius, intending not merely to regulate the conduct of war but to distinguish between its lawful and unlawful occasions, should relegate the law of peace to a subordinate place in his system; but when it came to be generally accepted that this latter task must be shirked and that all that the law could do in relation to war was to attempt to mitigate its horrors by regulation, it was unreasonable that the laws of war should continue, as they did, to monopolize the interest of writers and statesmen. If the law cannot regulate the outbreak of war, as Grotius vainly tried to do, then the service next in value to which its development ought to be directed is the improvement of the laws of peace, for in them lies the best hope of making wars less frequent.

Richard Zouche, 1590–1660, Professor of Civil Law in Oxford University and judge of the Court of Admiralty, was a prolific writer on legal subjects, among his works being one on international law, the *Jus et judicium feciale, sive jus inter gentes*, published in 1650. This has been called 'the first manual of international law',[1] for it discusses briefly but clearly almost every part of

[1] Scelle, *Fondateurs du droit international*, p. 322.

the subject. Without abandoning the law of nature as one of the bases of international law, Zouche preferred to deduce the law from the precedents of state practice, and he was therefore a precursor of the 'positive' school of international lawyers, who regard the practice of states as the only source of law. Zouche introduced one important improvement of method, for he was the first writer to make a clear division between the law of peace and the law of war, and to make the former the more prominent of the two. This was necessary before war could be regarded, as it ought to be, as an abnormal relation between states.

Samuel Pufendorf, 1632–94, Professor at Heidelberg, and afterwards at Lund in Sweden, published his *De jure naturae et gentium* in 1672, and may be regarded as the founder of the so-called 'naturalist' school of writers. He denied any binding force to the practice of nations and based his system wholly on natural law, but on a natural law in the new and debased form of a law supposed to be binding upon men in an imaginary *state of nature*. There are traces of this conception in Grotius, but it had little influence on his system; for his law of nature was a law of reason directing men at all times, whether organized in political societies or not, and only in this sense had the conception any permanent validity.

Cornelius van Bynkershoek (1673–1743), a Dutch judge, was the author of works on special parts of international law, of which the most important was the *Quaestiones juris publici*, published in 1737. Byn-

kershoek had an intimate knowledge of questions of maritime and commercial practice, and he has an important place in the development of that side of international law. He belongs to the 'positive' school of writers, basing the law on custom, but holding also that custom must be explained and controlled by reason, which he refers to as *ratio juris gentium magistra.*[1] He held also that the recent practice of states was more valuable evidence of custom than the illustrations from ancient history with which his predecessors had generally adorned their works, since, 'as customs change, so the law of nations changes';[2] but he attached more weight to the stipulations of particular treaties as evidence of the existence of custom than modern practice would allow.

Emerich de Vattel (1714–69), whose work *Le droit des gens* was published in 1758, was a Swiss who served in the diplomatic service of Saxony. He intended his work as a manual for men of affairs, and was a popularizer of other men's ideas rather than an original thinker; yet he has probably exercised a greater permanent influence than any other writer on international law, and his work is still cited as an authority in international controversies. He accepted the doctrine of the *state of nature*; 'nations being composed of men naturally free and independent, and who before the establishment of civil societies lived together in the state of nature; nations or sovereign states must be regarded as so many free persons living together in the state of nature'; and since men are naturally equal, so

[1] *Quaestiones*, Book I, ch. 12.

[2] Ibid., *Ad lectorem.*

are states; 'strength or weakness produce in this regard no distinction. A dwarf is as much a man as a giant is; a small republic is no less a sovereign state than the most powerful kingdom' (Introduction). Thus the doctrine of the equality of states, a misleading deduction from unsound premises,[1] was introduced into the theory of international law.

According to Vattel the law of nations *in its origin* is merely the law of nature applied to nations, it is not subject to change, and treaties or customs contrary to it are unlawful. But other elements have been admitted into the law; for, says Vattel, natural law itself establishes the freedom and independence of every state, and therefore each is the sole judge of its own actions and accountable for its observance of natural law only to its own conscience. Other states may *request* it to reform its conduct; but what they may actually *demand* from it is something much less. This lower standard of *enforceable* duties Vattel calls the *voluntary* law of nations, because it is to be presumed that states have agreed to it, in contrast with the other element of natural or, as he calls it, *necessary* law. 'Let each sovereign make the *necessary* law the constant rule of his conduct; he must allow others to take advantage of the *voluntary law of nations*' (Book III, ch. 12).

This exaggerated emphasis on the independence of states had the effect in Vattel's system of reducing the natural law, which Grotius had used as a juridical barrier against absolute conceptions of sovereignty, to little more than an aspiration after better relations

[1] See *post*, p. 90.

between states; yet for the *voluntary* law, which was the only part of Vattel's system which had a real relation to the practice of states, he provided no sound basis in theory, for he was unable to explain the source of the obligation of states to observe it. The results of this unsatisfactory division were unfortunate. For instance, Vattel tells us that by the *necessary* law a state has a duty to maintain freedom of commerce, because this is for the advantage of the human race; but by the *voluntary* law it may impose such restrictions upon it as suit its convenience, for its duties to itself are more important than its duties to others (Book II, ch. 2). By *necessary* law, again, there are only three lawful causes of war, self-defence, redress of injury, and punishment of offences; but by *voluntary* law we must always assume that each side has a lawful cause for going to war, for 'princes may have had wise and just reasons for acting thus, and that is sufficient at the tribunal of the voluntary law of nations' (Book II, ch. 18).

In some respects, however, Vattel's system was an advance on those of his predecessors. He stood for a humaner view of the rights of war. He emphatically rejected the patrimonial theory of the nature of government; 'this pretended right of ownership attributed to princes is a chimera begotten of an abuse of the laws relating to the inheritances of individuals. The state is not, and cannot be a patrimony, since a patrimony exists for the good of the owner, whereas the prince is appointed only for the good of the state' (I. 5). He recognized in certain circumstances the right of part

of a nation to separate itself from the rest (I. 17), a doctrine which partly explains his great popularity in the United States, where a copy of the work was first received in 1775. Professor De Lapradelle has justly written of him that,

'before the great events of 1776 and 1789 occurred, he had written an international law, based on the principles of public law which two Revolutions, the American and the French, were to make effective. . . . Vattel's *Law of Nations* is international law based on the principles of 1789 . . . the projection upon the plane of the law of nations of the great principles of legal individualism. That is what makes Vattel's work important, what accounts for his success, characterizes his influence, and eventually, likewise, measures his shortcomings. Grotius had written the international law of absolutism, Vattel has written the international law of political liberty.'[1]

None the less the survival of Vattel's influence into an age when the 'principles of legal individualism' are no longer adequate to international needs, if they ever were, has been a disaster for international law. By making independence the 'natural' state of nations, he made it impossible to explain or justify their subjection to law; yet their independence is no more 'natural' than their interdependence. Both are facts of which any true theory of international relations must take account; the former is a more conspicuous, but not a more real, fact than the latter. It is true that in Vattel's own day the interdependence of states was less conspicuous in international practice than it is to-day;

[1] Introduction to Carnegie edition of Vattel, 1916.

and this partly excuses the one-sidedness of his system. None the less by cutting the frail moorings which bound international law to any sound principle of obligation he did it an injury which has not yet been repaired.

II

CHARACTER OF THE MODERN SYSTEM

§ 1. *The International Society.*[1]

LAW exists only in a society, and a society cannot exist without a system of law to regulate the relations of its members with one another. If then we speak of the 'law of nations', we are assuming that a 'society' of nations exists, and the assumption that the whole of the civilized world constitutes in any sense a single society or community is one which we are perhaps not justified in making without examination. In any case the character of the law of nations is necessarily determined by that of the society within which it operates, and neither can be understood without the other.

On the material side the influences making for the interdependence of the fifty or sixty political societies into which the modern world is divided are numerous and obvious. Modern science has given us enormously increased facilities and speed of communications, and modern commerce has created demands for the commodities of other countries which even the extravagances of modern economic nationalism are not wholly able to stifle. No question of the existence of an international society would be raised if material bonds of union were enough to create a society. But material

[1] Cf. Zimmern, *International Law and Social Consciousness*, in Grotius Society Transactions, vol. xx.

bonds, though necessary, are not enough without a social consciousness: without that they are perhaps as likely to be sources of friction as of friendship. Some sentiment of shared responsibility for the conduct of a common life is a necessary element in any society, and the necessary force behind any system of law; and the strength of any legal system is proportionate to the strength of such a sentiment.

It does not seem over-optimistic to believe that at least the elements of a social consciousness are present in international life, though if compared with those which hold together a modern state they may seem rudimentary and precarious. Doubtless, too, the links which hold together the different units of international society are of varying strength, and between some they perhaps hardly exist at all, but that, though an element of weakness, is sometimes true of the units which make up a state. But only a very gloomy pessimist would fail to recognize that common moral and cultural standards do exist internationally, that they influence conduct between nations, and that this community of sentiment, imperfect though it is, affords some basis for law.

§ 2. *The Modern 'Sovereign' State.*

The influences which keep the sentiment of international community, upon which the strength of international law depends, weak, are not far to seek. They are to be found in the many and deep differences which divide the international society, differences of race, language, tradition, economic interest, and the like. But these dividing influences are reflected in,

and draw enhanced strength from, the theory of sovereignty, the origin of which in the post-Reformation states has been already referred to.

The term 'sovereign state' expresses, but in a misleading way, a fact about modern states which is both true and important, but it is not the same fact as that which the theory of sovereignty originally expressed.[1] In the original theory it was not the state that was sovereign, but a person or persons *within* a state that were 'sovereign' over the rest. This was in accordance with the derivation of the word from the late Latin *superanus*, meaning 'superior'; for 'superiority' is a relative term, and implies other persons who are subordinate to the 'superior'. The original theory thus picked out the distinction between persons who rule and persons who are ruled as being the most characteristic feature of states, as indeed it was in most countries during the seventeenth and eighteenth centuries. In certain contexts the word is still used in this its proper and original sense as an attribute to a person. Thus English law will not allow judicial proceedings to be brought against persons whom the King recognizes as 'sovereigns', for example, the ruling princes of India, even though neither these persons themselves, nor their states, are sovereign in the modern international sense. The Prayer Book, too, speaks of 'our sovereign Lord the King', implying that the King is our 'superior' and that we are his subjects; but when we use these words, we are conscious that they no longer express, as they once did, an important truth

[1] *Supra*, pp. 6–7.

about the nature of English government. The word is used in a similar sense when the British Parliament is called a 'sovereign' Parliament; for this merely means that there are no *legal* limitations on the legislative powers of the King in Parliament, which is an important truth of English constitutional law, but nothing more. We cannot argue from it, for example, as the original doctrine of sovereignty required us to believe, that in every state there must necessarily be some person or body with unlimited legislative powers; there is in fact no such person or body in the constitution of the United States. Nor do we imply by it that the really significant fact about English constitutional arrangements is that certain persons, the King and the members of the two Houses of Parliament, are members of a sovereign body which rules, and that the rest of us are their subjects who obey. The truth is that the original theory of sovereignty, with its division of the state into persons who rule and persons who are ruled, was always a too simple analysis of political facts, and it is wholly inapplicable to a modern constitutional state; in such a state no person or body exercises unlimited powers, or rules without being also ruled, and every holder of power is accountable for its exercise according to law. The advent of constitutional government really demanded a new theory of the nature of states to take the place of the theory of sovereignty, which, though approximately true in its time, had ceased to be a rational account of the changed facts.[1]

[1] This is well pointed out in Sabine and Shepard's Introduction to their translation of Krabbe's *Modern Idea of the State*.

Unfortunately for the clearness of our thinking on political matters the hold of sovereignty on the imagination was so strong that instead of formulating a new theory political science merely tried to adapt the old theory to new conditions. Sovereignty, it was felt, must be somewhere or a state would not be a state, for philosophers and lawyers had come to speak of sovereignty almost as if it were a substance, instead of being merely an abstract idea invented by their predecessors to explain the political facts of their time; and as it was no longer possible to maintain that there was always a person or persons exercising unlimited authority over all the others, men began to attribute the sovereignty to the people as a whole. The theory of 'popular sovereignty' was a justified protest against the old conception of government as the arbitrary function of particular persons, but it involved a confusion of thought; it tried to combine two contradictory ideas, that of absolute power somewhere in the state, and that of the responsibility of every actual holder of power for the use to which he put it. In truth there had ceased to be a sovereign in any intelligible sense when all the powers of government had become *limited* powers. Still another device for retaining the doctrine of sovereignty while adapting it to modern conditions has been to attribute sovereignty to the personified state itself; and this is the usage still current in the literature of international law. But this has only added to the confusion. We may properly speak of states as 'independent' in the sense to be explained later; but it is meaningless to say that they are

'sovereign', that is to say, superior, when we are speaking of their relations to one another. Little harm would be done if the word when applied to states had come to have a purely formal meaning, as it has in the phrase 'our sovereign Lord the King', but in fact the old associations of a power not controlled by law and indeed by its very nature not admitting of control by law, still cling to our notions of the state in its external relations, though they have largely disappeared in the relations between a state and its own citizens.

The theory of sovereignty was invented and developed by political theorists who were not interested in, and paid practically no regard to, the relations of states with one another; and it is not only inconsistent with the subjection of states to any kind of law, but it is in fact an impossible theory for a world which contains more states than one.

§ 3. *The Basis of Obligation in Modern International Law.*

The survival of the theory of sovereignty has had unfortunate effects on international legal theory, for writers on international law have naturally found it difficult to explain how that law can be binding on entities whose essential nature is supposed to place them above law. Two doctrines which attempt to resolve this contradiction may be regarded as in the orthodox tradition of international legal theory.

The doctrine of 'fundamental rights' is a corollary of the doctrine of the 'state of nature', in which men are supposed to have lived before they formed them-

selves into political communities or states; for states, not having formed themselves into a super-state, are still supposed by the adherents of this doctrine to be living in such a condition. It teaches that the principles of international law, or the primary principles upon which the others rest, can be deduced from the essential nature of the state. Every state, by the very fact that it is a state, is endowed with certain fundamental, or inherent, or natural, rights. Writers differ in enumerating what these rights are, but generally five rights are claimed, namely, self-preservation, independence, equality, respect, and intercourse. It is obvious that the doctrine of fundamental rights is merely the old doctrine of the natural rights of man transferred to states. That doctrine has played a great part in history; Locke justified the English Revolution by it, and from Locke it passed to the leaders of the American Revolution and became the philosophical basis of the Declaration of Independence. But hardly any political scientist to-day would regard it as a true philosophy of political relations, and all the objections to it apply with even greater force when it is applied to the relations of states. It implies that men or states, as the case may be, bring with them into society certain primordial rights not derived from their membership of society, but inherent in their personality as individuals, and that out of these rights a legal system is formed; whereas the truth is that a legal right is a meaningless phrase unless we first assume an objective legal system from which it gets its validity. Further, the doctrine implies that the social bond

between man and man, or between state and state, is somehow less natural, or less a part of the whole personality, than is the individuality of the man or the state, and that is not true; the only individuals we know are individuals-in-society. It is especially misleading to apply this atomistic view of the nature of the social bond to states. In its application to individual men it has a certain plausibility because it seems to give a philosophical justification to the common feeling that human personality has certain claims on society; and in that way it has played its part in the development of human liberty. But in the society of states the need is not for greater liberty for the individual states, but for a strengthening of the social bond between them, not for the clamant assertion of their rights, but for a more insistent reminder of their obligations towards one another. Finally, the doctrine is really a denial of the possibility of development in international relations; when it asserts that such qualities as independence and equality are inherent in the very nature of states, it overlooks the fact that their attribution to states is merely a stage in an historical process; we know that until modern times states were not regarded either as independent or equal, and we have no right to assume that the process of development has stopped. On the contrary it is not improbable, and it is certainly desirable, that there should be a movement towards the closer interdependence of states, and therefore away from the state of things which this doctrine would stabilize as though it were part of the fixed order of nature.

The doctrine of positivism, on the other hand, teaches that international law is the sum of the rules by which states have *consented* to be bound, and that nothing can be law to which they have not consented. This consent may be given expressly, as in a treaty, or it may be implied by a state acquiescing in a customary rule. But the assumption that international law consists of nothing save what states have consented to is an inadequate account of the system as it can be seen in actual operation, and even if it were a complete account of the contents of the law, it would fail to explain why the law is binding. It is in the first place quite impossible to fit the facts into a consistently consensual theory of the nature of international law. *Implied* consent is not a philosophically sound explanation of customary law, international or municipal; a customary rule is observed, not because it has been consented to, but because it is believed to be binding, and whatever may be the explanation or the justification for that belief, its binding force does not depend, and is not even regarded as depending, on the approval of the individual or the state to which it is addressed. Further, in the practical administration of international law states are continually treated as bound by principles which they cannot, except by the most strained construction of the facts, be said to have consented to, and it is unreasonable, when we are seeking the true nature of international rules, to force the facts into a preconceived theory instead of finding a theory which will explain the facts as we have them. For example, a state which has newly come into existence

does not in any intelligible sense *consent* to accept international law; it does not regard itself, and it is not regarded by others, as having any option in the matter. The truth is that states do not regard their international legal relations as resulting from consent, except when the consent is *express*,[1] and that the theory of *implied* consent is a fiction invented by the theorist; only a certain plausibility is given to a consensual explanation of the nature of their obligations by the fact, important indeed to any consideration of the methods by which the system develops, that, in the absence of any international machinery for legislation by majority vote, a *new* rule of law cannot be imposed upon states merely by the will of other states.

But in the second place, even if the theory did not involve a distortion of the facts, it would fail as an explanation. For consent cannot of itself create an obligation; it can do so only within a system of law which declares that consent duly given, as in a treaty or a contract, shall be binding on the party consenting. To say that the rule *pacta servanda sunt* is itself founded on consent is to argue in a circle. A consistently consensual theory again would have to admit that if consent is withdrawn, the obligation created by it comes to an end. Most positivist writers indeed would not admit this, but to deny it is in effect to fall back on an unacknowledged source of obligation, which, whatever it may be, is not the consent of the state, for that has ceased to exist. Some modern German

[1] Cf. Reeves, *La Communauté internationale*, p. 40, in the *Recueil* of the Hague Academy, vol. 3.

writers, however, do not shrink from facing the full consequences of the theory of a purely consensual basis for the law; they have inherited from Hegel a doctrine known as the 'auto-limitation of sovereignty', which teaches that states are sovereign persons, possessed of wills which reject all external limitation, and that if we find, as we appear to do in international law, something which limits their wills, this limiting something can only proceed from themselves. Most of these writers admit that a self-imposed limitation is no limitation at all; and they conclude therefore that so-called international law is nothing but 'external public law' (*äusseres Staatsrecht*), binding the state only because, and only so long as, it consents to be bound. There is no flaw in this argument; the flaw lies in the premises, because these are not derived, as all positivist theory professes to be, from an observation of international facts. The real contribution of positivist theory to international law has been its insistence that the rules of the system are to be ascertained from observation of the practice of states and not from *a priori* deductions, but positivist writers have not always been true to their own teaching; and they have been too ready to treat a method of legal reasoning as though it were an explanation of the nature of the law.

There need be no mystery about the source of the obligation to obey international law. The same problem arises in any system of law and it can never be solved by a merely *juridical* explanation.[1] The

[1] Cf. Triepel, *Droit international et droit interne*, p. 81.

answer must be sought outside the law, and it is for legal philosophy to provide it. The notion that the validity of international law raises some peculiar problem arises from the confusion which the doctrine of sovereignty has introduced into international legal theory. We have accepted a false idea of the state as a personality with a life and a will of its own, still living in a 'state of nature', which is contrasted with the 'political' state in which individual men have come to live. This assumed condition of states is the very negation of law, and no ingenuity can explain the coexistence of the two. But it is a notion as false analytically as it admittedly is historically. The truth is that states are not persons, however convenient it may often be to personify them; they are merely *institutions*, that is to say, organizations which men establish among themselves for securing certain objects, of which the most fundamental is a system of order within which the activities of their common life can be carried on. They have no wills except the wills of the individual human beings who direct their affairs; and they exist not in a political vacuum but in continuous political relations with one another. Their subjection to law is as yet imperfect, though it is real as far as it goes; the problem of extending it is one of great practical difficulty, but it is not one of intrinsic impossibility. There are important differences between international law and the law under which individuals live in a state, but those differences do not lie in metaphysics nor in any mystical qualities of an entity called state sovereignty.

§ 4. *The Sources of Modern International Law.*

Article 38 of the Statute of the Permanent Court of International Justice directs the Court to apply:

(1) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States:
(2) International custom, as evidence of a general practice accepted as law;
(3) The general principles of law recognized by civilized nations;
(4) Subject to the provisions of Article 59,[1] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This is a text of the highest authority, and we may fairly assume that it expresses the duty of any tribunal which is called upon to administer international law.

(a) *Treaties as a source of law.*

'Agreement is a law for those who make it, which supersedes, supplements, or derogates from the ordinary law of the land. *Modus et conventio vincunt legem.*'[2] It is natural, therefore, to find that in seeking the law applicable to the facts of a particular case the Court is first directed to inquire whether the general law, under which their rights would otherwise fall to be determined, has been excluded by an agreement between them. There is indeed more scope for the

[1] This article provides that 'the decision of the Court has no binding force except between the parties and in respect of that particular case'.

[2] Salmond, *Jurisprudence*, p. 31.

application of this maxim in international than there is in municipal law, for municipal law generally includes a great number of peremptory rules the application of which cannot be excluded by agreement between the parties, whereas in international law almost complete freedom of contract prevails.

Treaties then are clearly a source of law for the parties to them, of 'special' or 'particular' law. But can we go further and describe them in any sense as a source of 'general' international law? Certainly it is only a special class of treaty which has any claim to be so regarded. The ordinary treaty by which two or more states enter into engagements with one another for some special object can very rarely be safely used as evidence to establish the existence of a rule of general law; it may well be that the very reason of the treaty was to create an obligation which would not have existed by the general law, or to exclude an existing rule which would otherwise have applied. Still less can such treaties be regarded as actually creating new law. The only class of treaties which it is admissible to treat as a source of general law are those which a large number of states have concluded for the purpose either of declaring their understanding of what the law is on a particular subject, or of laying down a new general rule for future conduct, or of creating some international institution. Such treaties are, as will appear in the next chapter, the substitute in the international system for legislation, and they are conveniently referred to as 'law-making' treaties; their number is increasing to-day so rapidly

that the 'conventional law of nations', which is the name given to the law which they create, has taken its place beside the older customary law and perhaps already surpasses it in importance. These terms are convenient, and they are not inaccurate, for it is not necessary that all the rules of a legal system should be binding on all the members of a community. But it must always be borne in mind that even a law-making treaty is subject to the limitation which applies to other treaties that it does not bind states which are not parties to it. Thus except in the almost impossible event of every state in the world becoming a party to one of these treaties, the law which it creates will not be law for every state. Some writers attempt to meet this difficulty by saying that the law which these treaties create is 'general', but not 'universal', international law; but the terminology is not very happy, nor does it really meet the crux of the difficulty. The real justification for ascribing a law-making function to these treaties is the practical one already referred to, that they do in fact perform the function which a legislature performs in a state, though they do so only imperfectly; and that they are the only machinery which exists for the purposive adapting of international law to new conditions and in general for strengthening the force of the rule of law between states. Moreover, there is something artificial in saying, even if it is strictly true in theory, that such important institutions of international life as the Postal and Telegraph Unions, or the European Danube Commission, or the Permanent Court of International

Justice, or the League of Nations with its multifarious activities, are nothing but contractual arrangements between certain states. It is right that we should look behind the form of these treaties to their substantial effect.

(b) *Custom as a source of law.*

Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that if the usage is departed from some sort of evil consequences will probably, or at any rate ought to, fall on the transgressor; in technical language there must be a 'sanction', though the exact nature of this need not be very distinctly envisaged. Evidence that a custom in this sense exists in the international sphere can be found only by examining the practice of states; that is to say, we must look at what states do in their relations with one another and attempt to understand why they do it, and in particular whether they recognize an obligation to adopt a certain course, or, in the words of Article 38, we must examine whether the alleged custom shows 'a general practice accepted as law'. Such evidence will obviously be very voluminous and also very diverse. There are multifarious occasions on which persons who act or speak in the name of a state do acts or make declarations which either express or imply some view on a matter of international law. Any such act or declaration may, so far as it goes, be some evidence that a custom, and therefore that a rule of international law,

does or does not exist; but of course its value as evidence will be altogether determined by the occasion and the circumstances. States, like individuals, often put forward contentions for the purpose of supporting a particular case which do not necessarily represent their settled or impartial opinion; and it is that opinion which has to be ascertained with as much certainty as the nature of the case allows. Particularly important as sources of evidence are diplomatic correspondence; official instructions to diplomatists, consuls, naval and military commanders; acts of state legislation and decisions of state courts, which, we may presume, will not deliberately contravene any rule regarded as a rule of international law by the state; opinions of law officers, especially when these are published, as they are in the United States.

In applying the forms of evidence which have been enumerated above in order to establish the existence of an international custom what is sought for is a general recognition among states of a certain practice as obligatory. It would hardly ever be practicable, and even the strictest of positivists admits that it is not necessary, to show that every state has recognized a certain practice, just as in English law the existence of a valid local custom or custom of trade can be established without proof that every individual in the locality, or engaged in the trade, has practised the custom. This test of *general* recognition is necessarily a vague one; but it is of the nature of customary law, whether national or international, not to be susceptible of exact or final formulation. When a system of

customary law is administered by courts, which perpetually reformulate and develop its principles, as in England, its uncertainty is so much reduced that it is hardly, if at all, greater than the uncertainty which attaches to enacted or to codified law; but the clarifying influence of courts is only beginning to be felt in international law. It is therefore even less possible to formulate its principles dogmatically than those of a national system of law. The difference, however, is not one between uncertainty and certainty in formulation, but merely between a greater and a less degree of uncertainty.

(c) *The general principles of law.*

Article 38 of the Statute of the Court directs it to refer to 'the general principles of law recognized by civilized nations'.[1] The phrase is a wide one; it includes, though it is not limited to, the principles of private law administered in national courts where these are applicable to international relations. Private law, being in general more developed than international law, has always constituted a sort of reserve store of principles upon which the latter has been in the habit of drawing. Roman law, as we have seen, was so drawn upon by the early writers on international law, and the process continues, for the good reason that a principle which is found to be generally accepted by civilized legal systems, may fairly be assumed to be so reasonable as to be necessary to the

[1] The best commentary on the significance of this paragraph in the Statute is in Lauterpacht, *Private Law Sources and Analogies of International Law.*

maintenance of justice under any system. Prescription, estoppel, *res judicata*, are examples of such principles.

The paragraph then introduces no novelty into the system, for the 'general principles of law' are a source to which international courts have instinctively and properly referred in the past. But its inclusion is important as a rejection of the positivist doctrine, according to which international law consists solely of rules to which states have given their consent. It is an authoritative recognition of a dynamic element in international law, and of the creative function of the courts which administer it.

(d) *Judicial precedents.*

These are described in Article 38 of the Statute as a 'subsidiary means for the determination of rules of law', and the words accurately state their function. Precedents are not binding authorities in international law, but the English theory of their binding force merely elevates into a dogma a natural tendency of all judicial procedure. When any system of law has reached a stage at which it is thought worth while to report the decisions and the reasoning of judges, other judges inevitably give weight, though not necessarily decisive weight, to the work of their predecessors or colleagues. There has hitherto been only a restricted scope for the operation of this tendency in international law for the practical reason that international adjudications have been relatively few, and reports have not been very readily accessible. This state of things is changing very rapidly to-day, and prece-

dents are taking their proper place in the system. The change is a wholly beneficial one; it is creating for international law an ampler stock of detailed rules, testing its abstract principles by their fitness to solve practical problems, and depriving it of the too academic character which has belonged to it in the past. No rule exists to determine the value of any particular precedent, and the decisions of national courts dealing with matters of international law may be helpful, as well as those of international courts; but the decisions of the Permanent Court itself naturally receive more respect than any others.

(e) *Text-writers.*

These again are a 'subsidiary means for the determination of rules of law'. The function of text-writers in the international system is in no way peculiar; it is a misapprehension to suppose that they have or claim any authority to make the law. Actually they render exactly the same services as in any other legal system. One of those services is to provide useful evidence of what the law is. This function is universally recognized, and it has been expressed by Mr. Justice Gray, delivering the judgment of the Supreme Court of the United States, in these words:

'International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial

decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators who by years of labour, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.'[1]

Another function of text-writers is referred to by Mr. Justice Gray when he speaks of their 'speculations concerning what the law ought to be', for their writings may help to create opinion which may influence the conduct of states and thus indirectly in the course of time help to modify the actual law. Whether the speculations of any particular author are likely to have this active influence depends mainly on his prestige, and on the persuasiveness with which he presents his arguments. But it is important not to confuse these two functions, the providing of evidence of what the law is, and the exercise of influence on its development.

The notion that the position of international differs from that of other legal writers, is perhaps due to two causes. The first is that in the past the influence of international writers as exponents of the law has not been brought into competition with the influence of judges. The second is that continental lawyers neither exalt the function of the judge, nor depreciate that of the text-writer, to the extent that the training of English lawyers leads them to do.

[1] *Paquete Habana* (1899) American Prize Cases, p. 1938.

(f) *The place of 'reason' in the modern system.*

In our discussion of natural law we saw that no system of law consists only of formulated rules, for these can never be sufficiently detailed or sufficiently foreseeing to provide for every situation that may call for a legal decision; those who administer law must meet new situations not precisely covered by a formulated rule by resorting to the principle which medieval writers would have called natural law, and which we generally call reason. Reason in this context does not mean the unassisted reasoning powers of any intelligent man, but a 'judicial' reason, which means that a principle to cover the new situation is discovered by applying methods of reasoning which lawyers everywhere accept as valid; for example, the consideration of precedents, the finding of analogies, the disengagement from accidental circumstances of the principles underlying rules of law already established. This source of new rules is accepted as valid and is constantly resorted to in the practice of states, both in the decisions of international tribunals and in the legal arguments conducted by foreign offices with one another, so that a positivism which refuses to accept it is untrue to its own premises. It is thus referred to in an interesting passage in an award of the Claims Tribunal which was set up by an agreement between the United States and Great Britain in 1910.

'Even assuming that there was . . . no treaty and no specific rule of international law formulated as the expression of a universally recognised rule governing the

case . . ., it cannot be said that there is no principle of international law applicable. International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find . . . the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals.'[1]

The admission of this element in the judicial process is indeed inevitable if we are to avoid the untenable conclusion that international law contains lacunae or 'gaps' which may conceivably oblige a court, instead of declaring the rights of the parties on the facts before it, to pronounce a *non liquet*, that is to say, to declare that in default of any rule applicable to the case the point at issue 'is not clear' and therefore cannot be decided. Such a situation does not in fact arise, in international, any more than it arises in municipal, litigation. It does not arise, because international law, like any other system of law, is, in a formal, though of course not in any other, sense a 'perfect' system; it can provide a solution for any issue submitted to a court, and it can do this because it accepts the practice by which the judge is required to 'find' a rule of law which is applicable to the case before

[1] Case of the *Eastern Extension, etc. Telegraph Co. Ltd.* Nielsen's Report, p. 75, quoted in Cory, *Compulsory Arbitration*, p. 226.

him. Lord Mansfield, perhaps the greatest judge who ever sat on the English bench, doubtless had the same principle in mind when he wrote: 'The law of nations is founded on justice, equity, convenience, and *the reason of the thing*, and confirmed by long usage.'[1]

§ 5. *Shortcomings of the modern system.*

It has been suggested that international law ought properly to be classified as a branch of ethics rather than of law. The question is partly one of words, because its solution will clearly depend on the definition of law which we choose to adopt, and will not affect the value of the subject one way or the other. But in fact it is both practically inconvenient and also contrary to the best juristic thought to deny its legal character. It is inconvenient because if international law is nothing but international morality, it is certainly not the whole of international morality, and it is difficult to see how we are to distinguish it from those other admittedly moral standards which we apply in forming our judgments on the conduct of states. For ordinary usage certainly uses two tests in judging the 'rightness' of a state's act, a moral test and one which is somehow felt to be independent of morality. Every state habitually commits acts of selfishness which are often gravely injurious to other states, and yet are not contrary to international law; but we do not on that account necessarily judge them to have been 'right'.

[1] For the occasion and reference see Pollock, *Essays in the Law*, p. 64.

It is confusing and pedantic to say that both these tests are moral. Moreover, it is the pedantry of the theorist and not of the practical man; for questions of international law are invariably treated as legal questions by those who conduct our international business and in the courts, national or international, before which they are brought; legal forms and methods are used in diplomatic controversies and in judicial and arbitral proceedings, and authorities and precedents are cited in argument as a matter of course.[1] In this connexion also it is a significant fact that when a breach of international law is alleged by one party to a controversy, the act impugned is practically never defended by claiming the right of private judgment, which would be the natural defence if the issue concerned the morality of the act; but always by attempting to prove that no rule has been violated. This was true even of such palpable breaches of international law as the invasion of Belgium in 1914, or the bombardment of Corfu in 1921.

The objection to the legal character of international law comes from the followers of those writers, such as Hobbes and Austin, who regard nothing as law which is not the will of a political superior. This, however, is a misleading and inadequate description even of the law of a state; it does not, for instance, account for the existence of the English Common Law; but even if it were true of the law of the state, that law is only one species of a wider genus. Professor Oppenheim has defined law as 'a body of rules for human

[1] Cf. Hall, *International Law*, 8th ed., p. 14.

conduct within a community which by common consent of this community shall be enforced by external power'.[1] Thus the Roman Catholic Church is a community which has its body of rules in the Canon law, and Roman Catholics feel that these rules are not merely a matter for the private judgment, but that they ought to be enforced by the power of the Church. The community of states, the character of which we have already considered, has not yet, like the state, developed regular machinery for the enforcement of its law, but its imperative character, as has been mentioned, is never denied by any of the members. The imperative character of national law is so strongly felt that national law has developed a machinery of enforcement or 'sanctions', which generally work smoothly, though never so smoothly as to make violations of law impossible. If the imperative character of international law were equally strongly felt, the institution of definite international 'sanctions' would easily follow. But this contrast only means that national law in modern times is generally, though by no means everywhere, a strong, whereas international law is still a weak, form of law; it does not justify us in denying the fundamental similarity of the two. The difference is one of the stage of development which has been reached; international law is law at an earlier stage than the law of a well-ordered modern state, and, as Dr. Figgis pointed out, the obedience which states render to it to-day is probably 'more regular and less reluctant than was the obedi-

[1] *International Law*, vol. i, p. 6.

ence six centuries ago paid to the Common Law by any decently placed medieval feudatory'.[1]

International law is in fact just a system of customary law, upon which has been erected, almost entirely within the last two generations, a superstructure of 'conventional' or treaty-made law, and some of its chief defects are precisely those which the history of law teaches us to expect in any system of customary law. Among these it is a common mistake to suppose that frequency of violation is one. Violations of the law are extremely rare in any customary system, and they are so in international law. The common impression to the contrary arises partly from the unfortunate concentration of popular interest on the laws of war which certainly are often broken, and partly from the fact that when a breach does occur it is often of a sensational character. But the laws of peace, which are far the most valuable part of the system, are on the whole regularly and unobtrusively observed in the daily intercourse of states. It follows that the efforts of those who would seek to cure the defects of international law merely by devising a better system of sanctions to secure its enforcement are misdirected; it is not the existence of a police force that makes a system of law strong and respected, but the strength of the law that causes a police force to be organized.

The weakness of international law lies deeper than this; it may be summed up by saying that a customary law can never be adequate to the needs of any but a most primitive society, and the international society

[1] *From Gerson to Grotius*, p. 16.

of to-day is not, except in the matter of its law, which merely reflects the weakness of the international social consciousness, at the primitive stage. More explicitly we may say that the inadequacy of the present law manifests itself in three ways, all of which are characteristic of customary law in general: in the smallness of its range, in the uncertainty of many of its rules, and in the slowness of its development.

All these defects are closely bound up with the weakness of the institutional side of international law, which will be examined in the next chapter. There is no international legislature to keep the law abreast of new needs in international society. There is no international executive power to enforce the law. There have been created, within the last two generations, certain international administrative bodies, important in themselves, but still quite inadequate to the mass of administrative business which ought to be treated to-day as of international concern. There have also been brought into existence in recent years international courts of justice, but their range of action is limited because resort to them is not yet compulsory. This institutional weakness has as a result that the greater part of international relations has not yet been brought within the regulating influence of international law. The conduct of a state is not brought under international law merely because it may affect the interests of other states; this may be true and yet the matter in question may fall within what is called the 'domestic jurisdiction' of a single state. For example, legislation restricting immigration is not a matter

which affects the interests only of the countries of immigration; on the contrary it creates serious difficulties for countries which have a surplus of population, and where economic life has come to depend on emigration facilities. This latter fact, however, is irrelevant from a legal point of view, for immigration, though it is only one side of a problem of great international concern, the problem of the migration of population, is a matter which international law leaves each country to determine for itself. Other illustrations of matters which at present international law leaves to 'domestic jurisdiction' are a state's treatment of its own subjects in the absence of any treaty for the protection of minorities, its choice of a form of government, its naturalization laws, although its action on any of these matters may easily have repercussions on the interests of other states. But the most serious limitation on the range of international law is that practically the whole sphere of international economic relations, except where mutual concessions have been arranged by treaty, belongs to domestic jurisdiction. Tariffs, bounties, preferences, raw materials, markets and the like are the matters which generally underlie the rivalries of modern states and provide the causes, if not the occasions, of their disputes; yet international law can very rarely interpose its regulating influence here. Law will never play a really effective part in international relations until it can annex to its own sphere some of the matters which at present lie within the 'domestic jurisdictions' of the several states; for so long as it has to be admitted that

one state may have its reasonable interests injuriously affected by the unreasonable action of another, and yet have no legal basis for complaint, it is inevitable that the injured state, if it is strong enough, will seek by other means the redress that the law cannot afford it. At the best the present state of things leads to the maintenance by powerful states of policies outside the law, conceived in their own interests, and paying only so much regard to the interests of the other states as prudence dictates. Such policies cannot even, as things are, be wholly condemned, because the interests which they protect are often perfectly reasonable interests such as any really adequate system of law would recognize and safeguard; but, unfortunately, there is at present no security that these policies will be confined to the protection of the *reasonable* interests of the states concerned.

The uncertainty of many of the rules of international law is an inevitable consequence of the absence of any authoritative law-declaring machinery. It is not in the nature of any law to provide mathematically certain solutions of problems which may be presented to it; for uncertainty cannot be eliminated from law so long as the possible conjunctions of facts remain infinitely various. The difference between international law and the law of a state in this respect is therefore one of degree and not of kind, and it tends to be reduced as the practice of resorting to international courts, which are able to work out the detailed practical implication of general principles, becomes more common. The difficulty of formulating

the rules of international law with precision is a necessary consequence of the kinds of evidence upon which we have to rely in order to establish them.[1]

The two defects which we have considered would be less serious if the means of developing the law were more adequate than they are. But the growth of a new custom is always a slow process, and the character of international society makes it particularly slow in the international sphere. The means of developing the conventional element in the law, upon which the hope of any substantial advance must mainly depend, are also, as will be seen in the next chapter, not yet adequate to the great need for an extension of the rule of law in the international field.

[1] See *supra*, p. 49.

III

THE LEGAL ORGANIZATION OF INTERNATIONAL SOCIETY

§ 1. *The Beginnings of International Constitutional Law.*

UNTIL very modern times government has been regarded as a purely national function, and intercourse between states has taken place through national officials. This is still the general rule. Every state, for example, has a department of the national government corresponding to the Foreign Office; and the foreign offices of the world are linked together by the practice of 'legation', or sending of representatives to other states. Since the sixteenth century the practice of maintaining standing legations in other countries has been general, but envoys are still sometimes sent for special purposes as well. A diplomatic agent abroad is appointed by 'letters of credence' from his own government, which he presents to the head of the government to which he is 'accredited'. A state may decline to receive any particular representative, may ask for his recall, or even dismiss him; but any of these is a serious step which should not be taken except for good reason. This, however, and most of the other matters relating to diplomacy, with the exception of the immunities to which diplomatic persons are entitled by international law, belong to the sphere of international comity rather than to law.

But diplomacy of this kind is only an instrument for

conducting the business of one state with another, and not for conducting *general* international business in which a number of states have an interest. This latter kind of business increased enormously in importance and amount during the nineteenth century, and it has led to the development of institutions which, while they cannot yet be regarded as giving a 'constitution' to the international society, may not unfairly be described as a beginning of its constitutional law.

These institutions operate by organizing co-operation between the national governments and not by superseding or dictating to them, and they are, therefore, probably not so much the beginnings of an international 'government', though the term is often convenient, as a substitute for one. Their consideration, however, invites the same questions as those which arise in the study of any other legal system, and it is proper to ask how far and in what manner they perform for international law the functions which governmental institutions perform for the law of a state, that is to say, the functions of legislation, of execution and administration, and of judicature.

§ 2. *The Legislative Function.*

An international legislature, in the sense of a body having power to enact new international law binding on the states of the world or on their peoples, does not exist. The very notion that international law requires any deliberate amendment is, indeed, quite a modern one. The international community has been content

to rely for the development of its law on the slow growth of custom, and perhaps the first recognition of the need of any consciously constructive process in building up the law is to be found in the declaration by the Congress of Paris in 1814 in favour of freedom of navigation on international rivers. This declaration was not immediately very effective, but it was important as showing that in the conference the international community had obtained a sort of rudimentary legislative organ. Little use, however, was made of conferences for this purpose until the latter half of the nineteenth century, but after the Conference of Paris in 1856, at which a famous Declaration dealing with the laws of maritime warfare was agreed to, quasi-legislation by conference became fairly frequent.[1]

The movement took different forms. To a large extent it was inspired by the humane desire to mitigate the horrors of war; examples of this are the Geneva Conventions of 1864, 1906, and 1929, for ameliorating the condition of the sick and wounded, and most of The Hague Conventions of 1899 and 1907. It took another form in the foundation of the international administrative system which is referred to in the next section. Lastly, conferences have often been used for the settlement of *special* political questions by action which is really legislative in character, although it generally preserves the forms of mere mediation between supposedly sovereign states; instances are,

[1] Mr. L. S. Woolf's *International Government* describes this movement with an admirable combination of scholarship and humour.

the Conference of London which established the independence of Belgium in 1831; the Conference of London which established that of Luxemburg in 1867; the Congress of Berlin, 1878, which dealt with the affairs of Turkey and the Balkan States; the Conference of Algeciras which dealt with Morocco in 1906. On these and other occasions states asserted a right to decide, by their collective action, questions in which they all felt themselves to be interested, without much regard to the alleged rules of international law concerning intervention, which are based upon a theory of the independence of every sovereign state which is liable to be disregarded in an international crisis. There is no doubt that the conference used in this way has frequently been the means of preventing wars.

The process of changing the law by means of conventions reached at international conferences has obvious disadvantages if we compare it with the work of an ordinary legislative body. The conference is not a continuous body; it meets for some special purpose and then dissolves. The conventions at which it arrives have no binding force over states which do not accept them, and there is an unfortunate tendency for states, through apathy, through the pressure of some domestic interest, or for some other reason, to fail to ratify even those conventions which their representatives have signed. But more serious than the difficulties which arise from the defective nature of international legislative machinery is the psychological difficulty of mobilizing public opinion behind proposals for international legislation. Only a small

minority of the people of any country are continuously interested in international affairs, and the domestic claims upon the time and energies of statesmen are so numerous that they are not easily induced to take up proposals of reform for which there is no very insistent demand. Almost any proposal for international change by agreement also involves some sacrifice or apparent sacrifice of national interest, and in the general ignorance of the issues at stake the sacrifice is easily made to appear greater than the compensating advantage. But despite all these difficulties the volume of international legislation is already considerable and is rapidly increasing. A recent writer[1] has estimated that during the half century, 1864 to 1914, 257 international conventions of a legislative kind were entered into, and that during the years 1919 to 1929, that is to say in the first eleven years after the foundation of the League of Nations, there were no less than 229. These figures naturally include, as does the statute book of any legislature, many instruments not in themselves very important, but they are significant of a great and promising change in the management of international affairs.

The existence of the League of Nations has greatly stimulated the practice of international legislation. Article 19 of the Covenant empowers the Assembly of the League 'to advise the reconsideration of treaties which have become inapplicable, and the consideration of conditions whose continuance might endanger

[1] Professor Manley O. Hudson in *International Legislation*, vol. i, p. xxxvi.

the peace of the world'; but this article is rather a recognition than a solution of the problem, and it has not proved to be, and at any rate in its present form is not likely to be, very effective. The Assembly can only 'advise' and not insist, and even to advise it is probable that it must be unanimous. These weaknesses might no doubt be removed by amendments, which on paper would be very simple, giving the Assembly power to advise by something less than a unanimous vote, and binding the member states of the League to give effect to the Assembly's decision. But this would involve a revolutionary change in the character of the League, and indeed of the whole present organization of international society, by converting the Assembly into a true legislature superior to the states. Such a change may or may not be desirable, but it seems improbable in the near future.

Actually the League has hitherto promoted international legislation, not by the use of Article 19, but by the normal working of its institutions, and its method has necessarily been one of persuading the States to accept changes and offering them a convenient procedure for doing so, and not of attempting to dictate to them. The Assembly itself occasionally acts as a conference at which conventions are drawn up. But more important for this purpose is the system of expert Committees,[1] the reports of which often lead to conferences which may translate their recommendations into conventions.

[1] *Infra*, p. 82; and see Greaves, *League Committees and World Order*, Oxford, 1931.

Lastly, in contrasting the international with a municipal system of legislation, it is easy to exaggerate the efficiency of the latter or the speed with which it works. Great reforms are not easily introduced under any system; they are generally the result of years of discussion, of propaganda, of compromise with opponents, of devotion to a cause. A majority, even if it has the legal power to do so, does not in constitutionally governed states invariably impose its will on a minority. The best decisions and those which are likely to be the most durable are often those which come, as in the international sphere they can only come, with the consent of those whom they will affect, for modern legislation in a state, like all international legislation, tends more and more to be effective only to the extent that it can secure their co-operation in working it.[1]

§ 3. *The Executive and Administrative Functions.*

The international system does not directly provide for the exercise of the executive function of government. It has no central organ with the duty to see that international law is observed, and no instruments in the shape of an army or police force to enforce its observance. Even in the one signal attempt which has hitherto been made to organize internationally a system of coercion, the provisions for sanctions in Article 16 of the Covenant,[2] the method used is that of trying to co-ordinate the action which

[1] For a discussion of this point see Delisle Burns, *Democracy*.

[2] *Infra*, p. 240.

individual members of the League have severally covenanted to take against a law-breaker and not of setting up an authority with power to decide what measures shall be taken.

This absence of an executive power means that each state remains free, subject to the limitations on the use of force to be discussed later,[1] to take such action as it thinks fit to enforce its own rights. This does not mean that international law has no sanctions, if that word is used in its proper sense of means for securing the observance of the law; but it is true that the sanctions which it possesses are not systematic or centrally directed, and that accordingly they are precarious in their operation. This lack of system is obviously unsatisfactory, particularly to those states which are less able than others to assert their own rights effectively. But the defect should not be exaggerated. For the most urgent part of the problem, that of securing the subordination of the use of force to the rule of law, Article 16 has now attempted a solution; and for the enforcement of the legal duties of states in general public opinion ordinarily provides a tolerably effective sanction. As has already been pointed out,[2] the international law of peace is normally well observed, and to the extent that that is so, sanctions are unnecessary. It is well observed, not because states are by nature more law-abiding than individuals, but partly because the restraints which international law at present imposes on their freedom of action are not very onerous, and partly because states are extremely sensitive

[1] *Infra*, ch. ix. [2] *Supra*, p. 60.

to a charge of deliberately breaking the law. Most of the breaches of law which they might be tempted to commit, the repudiation of a treaty, the refusal to accept an adverse judgment or award, involve a notoriety which states are generally very reluctant to incur; and the breaches of law which they can commit without publicity would be just the breaches which even an organized system of sanctions would be likely to fail to reach.

The difficulties of introducing any radical change in the present means of enforcing international law should also not be under-estimated. The problem has little analogy with that of the enforcement of law within the state, and the popular use of such phrases as an 'international police force' tends to make it appear much simpler than it really is. Police action suggests the bringing to bear of the overwhelming force of the community against a comparatively feeble individual law-breaker, but no action of that sort is possible in the international sphere, where the potential law-breakers are states, and the preponderance of force may even be, as it probably was in the special circumstances of the Sino-Japanese dispute of 1931, on the law-breaking side.

The administrative function, like the executive, is not provided in the international system with any centralized organ, but in the latter half of the nineteenth century a number of separate institutions with specialized administrative functions were created. They arose not from any idealistic theory of international relations, but from the compelling force of

circumstances; in one department of administration after another experience showed that government could not be even reasonably efficient if it continued to be organized on a purely national basis. These institutions are known as 'public international unions'. They differ from such international organs as the Danube[1] and other river Commissions because their object is not merely to undertake some special task in which a number of nations are interested, but actually to relieve the several national administrations of a part of the work which they would normally undertake but which experience has shown that they cannot efficiently perform. The first such union was the International Telegraphic Union formed in 1865; others are the Universal Postal Union of 1874, the International Institute of Agriculture of 1905, the Radio-telegraphic Union of 1906. These unions differ in their constitution, but it will suffice to take the Postal Union as an example of the type. This was not achieved until efforts to carry on foreign postal services by a number of separate treaties between pairs of states had revealed the hopeless inefficiency, from a business point of view, of adhering to theories of independence in such a matter as postage, and it was resisted in almost every country, both as an infringement of sovereignty, and as involving an abandonment of the principle by which every state, as far as it can, tries to 'make the foreigner pay' the expenses of its government. It consists of a Congress which meets at intervals, in which each state, including the Domi-

[1] *Infra*, p. 156.

nions and some of the colonies of the larger states, has one vote. The Congress has power to alter the rules of the Union by a majority vote, and although alterations have to be ratified by the governments, ratification has become a formality, since a refusal to ratify would involve leaving the Union, and no state is likely to do that. Besides the Congress, the Union has a permanent Bureau at Bern, which, amongst other functions, collects and distributes information, and acts as a clearing house for settling accounts. In the intervals between Congresses, the Bureau may receive proposals for altering the rules of the Union; it then proceeds to collect the votes of the states upon them, and the alteration may take effect without any meeting.

A less advanced type of the Public International Union is seen in the Copyright Union, formed in 1886, under which the rights of authors, composers, and others in their works are protected in foreign countries. This has a permanent Bureau at Bern, but no governing Congress; it operates under conventions which are revised from time to time by specially summoned conferences of states. Other Unions of this type are the Union of Railway Freight Transportation, established between the principal countries of the Continent in 1893, and the International Office of Public Health in Paris, established by the Sanitary Convention of 1903. Instances in which the modern movement towards international co-operation in the field of administration has not taken the form of creating an international organ, but has been limited to an agreement to co-ordinate national laws or to introduce

uniform methods into the national administration, are a Convention for the protection of submarine cables of 1884, the Automobile Convention of 1904, and a Convention of 1910 for the suppression of the White Slave Traffic.

These are a few out of the many experiments in international administrative co-operation which have been made in the last two generations under the impulse of difficulties which were incapable of being solved by methods of government organized on the traditional theory that each state is a sovereign and separate unit. States are no longer separate units in such matters as commerce, labour, art, morals, inventions, health; and slowly and as yet very imperfectly they are being compelled to recognize that they cannot be altogether separate units in the political or economic fields. The creation of the League of Nations, therefore, in 1919, was not the introduction of a wholly new principle into international life, but the logical outcome of a movement which had been gathering force for many years. It is distinguished from the previous steps in this movement by its *generality*. The older methods of diplomacy, first by means of legations from one state to another, and then by means of conferences, each summoned to deal with some special matter, have now been supplemented by a permanent organization facilitating the dispatch of *any* sort of diplomatic business; and the *special* organs for administering matters which past experience has shown can only be efficiently administered by international co-operation, have been supple-

mented by one that can take up any matter which the member-states think it right to treat by that method.

§ 4. *The League of Nations.*

The League of Nations is an institution which states have created as an instrument for the achievement of certain purposes, which are expressed in the preamble to the Covenant in the words, 'to promote international co-operation and to achieve international peace and security'. It cannot be fitted into any of the existing political categories; it is not a state, or a federation, or a confederation, or an alliance, or a super-state (whatever that much-abused term may mean). If an analogy must be sought, the League is perhaps more like a corporation than anything else,[1] and the Covenant is the charter which brought it into existence and defines its purposes. Perhaps the first step to an understanding of the nature of the League is to realize that its functions are not *governmental*; the members of the League have undertaken certain obligations which are embodied in the Covenant, but they have not created a body superior to themselves with power to take decisions capable of imposing new obligations on them. For good or for evil the states members of the League retain their 'sovereignty' in any sense in which they possessed it before.

The organs of the League are the Assembly, the Council, the Secretariat, and the technical organizations. The Assembly consists of representatives of all

[1] Cf. Fischer Williams, *Some Aspects of the Covenant*, p. 42.

the members. The Council, under the original scheme of the Covenant, was to have consisted of nine members, five Great Powers with permanent seats, and four others elected by the Assembly. But this scheme, recognizing, as it was intended to do, the greater responsibilites of the Great Powers, but mitigating their predominance by a minority representation of the smaller powers, never fully took effect owing to the defection of the United States; and through successive increases in the representation of the smaller powers, its only trace in the present composition of the Council is the survival of the distinction between permanent and non-permanent members. The present permanent members are the British Empire, France, Italy, and Russia; new permanent members may be elected by a unanimous vote of the Council with the consent of a majority of the Assembly. The non-permanent members, at present ten in number, are elected by the Assembly, which also has power to make rules regarding their election. Under the existing rules they hold their seats for three years, and are disqualified for re-election for three years after their retirement; but the Assembly by a two-thirds majority may declare not more than three states to be immediately re-eligible, and Spain and Poland are at present in this semi-permanent class. The position of a power which for the time being may not be a member of the Council is safeguarded by a provision that it must be invited to sit as a member whenever the Council considers any matter specially affecting its interests. The responsibility of the non-permanent members to the Assembly

which has elected them is secured by a provision, never used hitherto, whereby the Assembly, by a two-thirds majority, may at any time declare all the ten seats vacant and proceed to new elections. A state may withdraw from the League by giving two years' notice of its intention to do so.

The relations between the Assembly and the Council are nowhere distinctly laid down in the Covenant. Either of them may deal with 'any matter within the sphere of action of the League or affecting the peace of the World'. But as all the members of the Council are also members of the Assembly, and as neither body as a rule can act except by unanimity, actual conflicts between the two are unlikely. The Council is a smaller body and therefore better able to act in an emergency; it meets more frequently, at least three times a year, whilst the Assembly normally meets only once. There is a tendency for the Council to regard itself as a sort of executive committee of the Assembly, and for the Assembly to express general views of the policy that the League should pursue and leave the details to be worked out, and the administration in general to be supervised, by the Council. Each body also has certain special functions, which it does not share with the other, conferred upon it by the Covenant; thus it is for the Council to formulate plans for the limitation of armaments (Art. 8); to advise on the means whereby the guarantee against aggression contained in Article 10 should be fulfilled; to meet, at the request of any member of the League, in the event of war or threat of war (Art. 11); to

'recommend' the application of military sanctions (Art. 16); to supervise the mandatory system (Art. 22); and it is for the Assembly to advise the reconsideration of treaties under Art. 19.

In general decisions either of the Assembly or the Council must be unanimous, and it follows therefore that the League must rely on publicity and moral forces to overcome the opposition of a dissenting state; such a state cannot be outvoted. There are, however, certain exceptions to the requirement: (1) 'matters of procedure', a term not yet authoritatively defined, may be decided by a majority (Art. 5); (2) the Assembly may admit new members to the League by a two-thirds majority (Art. 1); (3) amendments of the Covenant take effect when ratified by all members of the Council and by a majority of the members of the Assembly (Art. 26); but a dissenting state, instead of being bound by an amendment, may cease to be a member of the League; (4) the consent of the parties is not necessary to a report by the Council or the Assembly on a dispute (Art. 15). But apart from these exceptions to the unanimity rule, the rule itself is by no means so serious a handicap on the effectiveness of the League as might have been expected. One of the most interesting results of the institution of the League has been to reveal the immense force of international public opinion, when this can be focused, as it is by the machinery of the League. It has been proved to be a force which it is extremely difficult, though, of course, not impossible, for even a Great Power to defy. Moreover, the necessities of business

oblige the League to work through committees, and in a committee the unanimity rule does not apply. It is true that the decision of a committee will only take effect if it is adopted by the Assembly or the Council; but experience shows that a small minority who have been outvoted in a committee do not as a rule persist in their opposition, though they are of course free to do so when the recommendation of the majority is brought up for adoption. There are also certain other alleviations of the rigidity of the rule which the usage of the League has sanctioned, which can be only generally referred to here.[1]

The permanent *Secretariat* consists of the Secretary-General and a staff, which is divided into sections, political, legal, economic, financial, communications and transit, health, mandates and others; and though the least conspicuous, it is an indispensable part of the whole League machinery, for it supplies the elements of continuity and regularity which had previously been lacking in efforts at international co-operation. Its work gives a business-like efficiency to a conference, meeting under the auspices of the League, which was impossible in the older procedure, under which the members might meet to find their agenda imperfectly prepared, an extemporized and inexperienced staff to assist them at the meetings, and no proper provision for carrying out whatever decisions they might arrive at. The Secretariat, in fact, constitutes an international civil service, and its existence is as essential to

[1] Reference may be made to Riches, *The Unanimity Rule and the League of Nations*, Johns Hopkins Press, 1933.

effective international co-operation as is the existence of a national civil service to a national government.

Article 23 of the Covenant laid upon the League the duty of undertaking or supervising a number of social and humanitarian tasks, and its provisions have led to the creation of a number of technical organizations dealing with communications and transit, economics, finance, health, and other matters. These organizations differ from one another in the details of their constitution. Some of them have acquired a measure of independence which is comparable to, though less than, that of the International Labour Organization to be described in the next section. Thus the Communications and Transit Organization consists of a General Conference meeting at fairly long intervals and composed of expert delegates from states, including states not members of the League; an Advisory and Technical Committee appointed by the Conference but reinforced by the addition of individual experts and meeting more frequently; and the section of the League Secretariat which is concerned with these questions. These technical organizations also fulfil functions towards the subject with which they deal which are similar to that of the International Labour Organization towards labour questions. They provide a forum for expert discussion; they organize research and distribute information; they advise the League on matters within their competence; and they stimulate international action by promoting conventions on particular parts of their subject which appear ripe for such treatment.

§ 5. *The International Labour Organization.*

The International Labour Organization is an autonomous institution set up by the peace treaties of 1919, but depending for its expenses on the Assembly of the League. Members of the League are members of the Organization, but other states may also belong to it, as at present do the United States and Japan. The Organization consists of (1) a General Conference of representatives, meeting at least once a year; and (2) a permanent Labour Office.

The Conference is composed of four members from each state, two being government delegates, and two non-government delegates representing employers and workpeople respectively. The latter are nominated by their governments, but they must be chosen in agreement with the industrial organizations which are most representative of employers and workpeople in the respective countries; and the Conference may refuse to admit a delegate whom it deems not to have been nominated in accordance with this provision. The delegates vote individually, the non-government having equal rights with the government delegates. This is a point of great interest to the theory of international relations; for in the General Conference we have a tentative recognition of the fact, which has long been apparent in every international sphere except the political, that interests which are of international concern do not necessarily follow, but often cross, the boundary lines of territorial states. Decisions of the Conference take the form either of draft

Conventions, or of Recommendations for national legislation. Either of these requires a two-thirds majority for adoption, and although the states are not bound to ratify a convention or to accept a recommendation, they must bring them before whatever authority in their respective countries is competent to deal with them by ratification or legislation or otherwise. It will be noted that this so-called 'ratification' differs from the ordinary ratification of a treaty which has been negotiated and signed by plenipotentiaries. A draft Labour convention is settled not by the states, but by the Conference; there is no stage corresponding to that of signature and the choice before the states is between acceptance or rejection. Reservations, which would violate the rights of the non-governmental members of the Conference, seem to be inadmissible. States must also make an annual report on the measures taken to give effect to conventions which they have ratified. Associations of employers or workers may make representations to the Labour Office of the failure of a state to observe a convention, and the Governing Body of the Office may ask the state to reply to the complaint and may publish the representation and the reply if any. If such a complaint is made by another state, the Governing Body may refer it to a Commission of Inquiry constituted out of a standing panel of employers, workers, and independent persons, which prepares a report and recommendations on the matter; the state affected may appeal against the recommendation to the Permanent Court, whose decision on the matter is final.

The Labour Office, which corresponds to the Secretariat of the League, is controlled by a Governing Body of thirty-two persons, sixteen representing governments, eight elected by the employers', and eight by the workers', delegates to the Conference. Each of the eight countries which the Council of the League decides to be of 'chief industrial importance'[1] nominates one of the governmental representatives, and the other eight are chosen from other states. Its functions are to collect and distribute information on all subjects relating to the international adjustment of industrial life and labour, to examine subjects which it is proposed to bring before the Conference, and to conduct such special investigations as the Conference may order.

[1] At present these countries are Great Britain, France, United States, Russia, Italy, Japan, Canada, and India.

IV

STATES

§ 1. *General Notion of States in International Law.*

A STATE is an *institution*, that is to say, it is a system of relations which men establish among themselves as a means of securing certain objects, of which the most fundamental is a system of order within which their activities can be carried on. Modern states are territorial; their control is exercised over persons and things within their frontiers, and to-day the whole of the habitable world is divided up between rather more than fifty of these territorial states. A state should not be confused with the whole community of persons living on its territory; it is only one among a multitude of other institutions, such as churches and corporations, which a community establishes for securing different objects, though obviously it is one of tremendous importance; none the less it is not an all-embracing institution, not something from which, or within which, all other institutions and associations have their being; many institutions, for example, the Roman Catholic Church, and many associations, for example, federations of employers and of workers, transcend the boundaries of any single state. Nor should a state be confused with a nation, although in modern times many states are organized on a national basis, and although also the terms are sometimes used interchangeably, as in the title 'League of Nations',

which is actually a league of states, and even in the term 'inter-*national* law'; a single state, like the British Empire, may include many nations, or a single nation may be dispersed among many states, as the Poles were before 1919. Further, the term 'state' is relative, for there may be states within a state. Whether a smaller entity, having certain institutions of self-government, but contained within a larger, should be called a state or not, is generally felt to depend upon the extent of its powers; but there can be no exact rule. A state of the American Union is invariably called a state, whereas an English county is not; a province of Canada, which has powers intermediate between these two, might or might not be so called. It is not, however, with all the institutions which in common parlance are called states that international law is concerned, but only with those whose governmental powers extend to the conduct of their external relations. Whether a state has such powers or not is a question of fact which must be answered by examining its system of government; the terminology which is used in the classification of composite states, or states which are 'composed of' other states, is an unsafe guide, both because different writers use the same terms in different senses, and also because the possible variations of state organization and inter-state relations, ranging as they do from mere alliance for temporary purposes, to complete amalgamation or subordination, are so many that a permanently valid classification is impossible. Most writers, for instance, distinguish a *federal state*, that is to say, a union of states in which the control of

the external relations of all the member states has been permanently surrendered to a central government so that the only state which exists for international purposes is the state formed by the union, from a *confederation of states*, in which a central government, though it exists and exercises certain powers, has not wholly absorbed the control of the member states' external relations so that for international purposes there exists not one state but a number of states. Thus the United States since 1787, the German Republic since 1918, and the Swiss Confederation since 1848, each form a single federal state, whereas the United States from 1778 to 1787, and the German Confederation from 1820 to 1866, were confederations of many states. This distinction would be convenient if it were always observed, but unfortunately it is not; for example, the Swiss Republic is always styled a *confederation*. But even so it would be difficult to classify all the states to which the classification is relevant under one or other of the two heads; for example, the German Empire from 1870 to 1918 was in essence a federal state, but in form it retained traces of a confederation of states, since Bavaria and some others of the member states were separately represented in foreign countries for certain limited and mainly honorary purposes.

§ 2. *Independent*[1] *and Dependent States.*

The states with whose relations international law is primarily concerned are those which are 'indepen-

[1] The dissenting opinion of M. Anzilotti in the case of the Austro-German Customs Union before the Permanent Court contains a

dent' in their external relations; to some extent it is also concerned with a few states which 'depend' on other states in the conduct of those relations in a greater or less degree. This simple fact that there exist 'dependent' as well as 'independent' states is sufficient to show that independence cannot be a fundamental right of states as such, even if there were no other objections to the doctrine of fundamental rights. The proper usage of the term 'independence' is to denote the status of a state which controls its own external relations without dictation from other states; it contrasts such a status with that of a state which either does not control its own external relations at all, and is therefore of no interest to international law, like the State of New York, or controls them only in part. The exact significance of the term appears most clearly in such a phrase as 'declaration of independence', whereby one state throws off the control of, or, its dependence on, another.

Independence is merely a descriptive term; it has no moral content. It may or may not be morally right or socially desirable that an actually independent state should remain independent, or that some community should break away from an existing state and form an independent state of its own. To insist on a 'right', and particularly on a 'natural right' of independence, suggests that for a state to pass from the condition of independence to that of dependence, as the American States did when they formed the

useful discussion of the meaning of 'independence'. (Reports of the P.C.I.J., Series A/B, No. 41, pp. 57–8.)

Union, necessarily involves a moral loss, instead of a mere change of legal status to be judged according to the circumstances of the case. Further, it should be noted that 'independence' is a negative term; we cannot legitimately infer from it anything whatsoever about the positive rights to which a state may be entitled. In particular, we have no right to argue as though an independent state had a right to determine its own conduct without any restraint at all; 'independence' does not mean freedom from law, but merely freedom from control by other states. Unfortunately, such a method of argument is very common; the associations of sovereignty have become attached in the popular mind to the notion of independence, and the word is often used as though it meant freedom from any restraint whatsoever, and appealed to as a justification for arbitrary and illegal conduct. The temptation to mistake catchwords for arguments is strong in all political controversy; it is especially dangerous in the controversies of states.

§ 3. *The doctrine of the Equality of States.*[1]

As we have seen, this doctrine was introduced into the theory of international law by the naturalist writers. It does not appear in Grotius. The reasoning of these writers was that as men in the 'state of nature', or before their entry into the political state, were equal to one another (a proposition entirely untrue), and as states are still in a 'state of nature', therefore they must

[1] Cf. Dickinson, *Equality of States in International Law*, and Baker in *B.Y.I.L.* 1923–4.

be equal to one another. Such a doctrine is justly criticized not only for the fallacy on which it rests, but because in its natural meaning it is contradicted by obvious facts. Actually states are unequal, by whatever test, civilization, size, population, wealth, or strength, they are measured; and if it were true that international law persisted in treating them as equal in spite of their obvious inequalities, such a rule would be as unjust as a rule which would give equal voting power to every shareholder in a company irrespective of the number of his shares.[1] In fact, international law is not so absurd; and states are not only politically unequal, as is universally admitted, but they often also have unequal rights in law. For example, some states are under protectorates; others, such as China, have their jurisdiction within their own territories limited by the system of Capitulations; others, such as Poland, Czechoslovakia, Jugoslavia, have had treaties imposed upon them which oblige them to accord certain treatment to racial or religious minorities among their own subjects; and in the League of Nations the Great Powers possess a definite legal superiority over the other states by being allotted permanent seats on the Council. If the theory of equality, therefore, is interpreted to mean that all states have equal rights in law, it is contradicted by the facts. It is a true theory only if it means that the rights of one state, whatever they may be, are as much entitled to the protection of law as the rights of any other, that is to say, if it merely denies that the weakness of a state is any excuse in

[1] Cf. Pollock, *League of Nations*, 2nd ed., p. 61.

law for disregarding its legal rights. This is the only sense in which any system of law can be said to recognize legal equality; all Englishmen are equally entitled to have their rights upheld by the law, but they do not all have equal rights. The smaller states not unnaturally cling to the doctrine in its widest signification, though even in theory it gives them no security which they do not obtain from their status as independent states, and as a matter of history it is doubtful whether it has ever restrained a powerful state from a meditated aggression; on the other hand, it has more than once encouraged the smaller states to prefer unreasonable claims which have seriously hampered the improvement of international organization. One such incident occurred at the Hague Conference of 1907, when the scheme for an international court of justice, upon which agreement had been almost reached, was wrecked by the refusal of some of the smaller powers to agree to anything less than equal representation of every state upon the court. The doctrine was innocuous so long as there existed practically no co-operative management of affairs of general international interest; if it is to be used to justify a claim by every state to an equal voice in the further organization of international society, it will be not only indefensible and unjust in principle, but obstructive of progress.

§ 4. *Types of Dependent States.*

Primarily, as we have seen, international law deals with the relations of independent states to one another. It is also to some extent concerned with certain other

states, which, though partly controlled by another state, still maintain some relations with states other than that which controls them. This relation of dependency is sometimes described as a *protectorate*, sometimes as a *suzerainty*, but it is difficult to give precise juristic signification to either term; the degree of control on one side and of dependency on the other may vary indefinitely, and in any case it must be deduced from the events or treaties which created the relation, and not from the term used to describe it.

A relation of dependency sometimes exists between two states in fact, but for political reasons is not avowed either as a protectorate or a suzerainty. Thus the United States has at times exercised far-reaching control over the nominally independent states of Central America; during the present century many of these countries have suffered one or more periods of American military government; and even when the native governments have been allowed to function, American officials have controlled the expenditure, collected the customs, commanded the constabulary, had the right to construct naval bases for American use, and a practically complete control of foreign relations. A similar *de facto* protectorate by Great Britain over Egypt also existed from 1882 to 1914, and perhaps must be said to be still existing.

The danger of deducing the legal incidents of the relation from the term by which it is described was illustrated in the discussion which preceded the South African War of 1899.[1] The question between Great

[1] Cf. Westlake, *Collected Papers*, p. 442.

Britain and the South African Republic, so far as it was a legal one, was whether the latter state had carried out the terms of the Convention of Pretoria, 1881, as modified by the Convention of London, 1884. But the controversy was confused and embittered by arguments attempting to show that Great Britain was entitled to rights of control other than those expressly stipulated for, because the former convention had described the relation then set up as a 'suzerainty'. With this should be contrasted the treatment of the matter in the judgment of Dr. Lushington in the case of *the Ionian Ships* (1855; 2 Spinks, 212). During the Crimean War these ships, the property of Ionian citizens, were brought in for adjudication on a charge of trading with the enemy; but the owners claimed that their country was at peace with Russia, and their trade therefore lawful. The Treaty of Paris, 1815, had declared 'the United States of the Ionian Islands' to be an independent state under the protection of Great Britain, and Dr. Lushington treated the question whether Ionians were British subjects as turning not on any general principle, but on the construction of the relations established by the particular treaty. In the result he held that the Islands were a separate state not automatically involved in the wars of Great Britain; that Great Britain had the right under the Treaty to make war and peace on their behalf, but that on this occasion she had not exercised it; the ships were, therefore, not liable to condemnation.[1]

[1] Professor H. A. Smith (*Great Britain and the Law of Nations*, vol. i, p. 68) shows that this decision conflicted with the view held in

At the present time there appears to be no instance of a relation between states which is described as a suzerainty. That term, besides being used of the relation between Great Britain and the South African Republic, was also used of the relation established between Turkey and Bulgaria from 1878 to 1909, but it seems likely to disappear from diplomatic terminology. Instances in which the existence of a protectorate over a state of European civilization is openly avowed are also at present few and unimportant; Andorra is under the joint protectorate of France and Spain, San Marino under that of Italy, and Monaco under that of France. There do still exist numerous protectorates over states of Oriental civilization, such as that of France over Tunis, but the growth of national sentiment in all parts of the world perhaps makes any extension of the status unlikely.

In contrast with these types of dependent states the status of 'neutralization' involves no impairment of independence. A neutralized state is merely one whose integrity has been permanently guaranteed by international treaty, conditionally on its maintaining a perpetual neutrality except in its own defence. Switzerland, the only remaining example of the status, was neutralized by the Treaty of Vienna, 1815, and the provision was reaffirmed by the Treaty of Versailles, 1919. Belgium and Luxemburg, which were neutralized by the Treaties of London of 1831 and

diplomatic and executive quarters, and that there are grave objections to holding that a protected state can be neutral when the protecting power is at war.

1867 respectively, ceased to have that status after the Great War, at any rate *de facto*, though it seems that some of the legal steps which are in principle necessary to abrogate it, have not yet been taken.[1] Switzerland is very tenacious of her status and scrupulous in performing its obligations; and when she joined the League of Nations, she did so on the understanding that she would not be required to take part in military action or even to permit the passage of foreign troops over her territory.

The difficulty of classifying in categories states which depart from the normal type of independent state may be illustrated by considering the position of Egypt and Danzig.

From 1882 to 1914 Great Britain exercised a *de facto* protectorate over Egypt, although in theory Egypt remained a vassal state of Turkey under an hereditary Khedive. The Soudan, after its conquest by an Anglo-Egyptian army under Lord Kitchener in 1898, was placed under a condominion of Great Britain and Egypt. In 1914 upon the outbreak of war between Turkey and Great Britain, the latter openly declared a protectorate over Egypt. This declaration did no more than bring the juridical theory of Anglo-Egyptian relations into accord with the facts, and as it was generally recognized by the other states concerned it must be accepted from the legal point of view as the starting-point of an inquiry into the present international status of Egypt.

[1] For particulars see Oppenheim, *International Law*, vol. i, 222–4 (4th ed.).

In 1922 Great Britain made a declaration professing to terminate the protectorate and to recognize Egypt as 'an independent sovereign state'. At the same time she reserved to her own discretion, pending an agreement with Egypt, four matters: (*a*) the security of British communications; (*b*) the defence of Egypt against foreign interference; (*c*) the protection of foreign interests and minorities in Egypt; (*d*) the question of the Soudan. This declaration was unilateral, and no agreement has yet been reached between Great Britain and Egypt on the reserved matters. The present legal position, therefore, appears to be that a protectorate in respect of the four matters reserved still exists in fact if not in name, and Great Britain appears to have acted upon this view in the strong measures taken against Egypt after the murder of the Sirdar, Sir Lee Stack, in 1924, measures which, on any other assumption, it would be difficult to justify.[1]

By the treaties of peace of 1919 Danzig was declared a 'free city' under the protection and guarantee of the League of Nations. The League ensures that the constitution of Danzig accords with the peace treaties, and is represented in Danzig for this and other purposes by a High Commissioner. But the League itself is not a state, and it has no army to ensure the protection of Danzig; it has therefore authorized its Commissioner to invite the help of Polish troops in case of need. The foreign relations of Danzig, however, are

[1] For the details of this incident see Toynbee, *Survey of International Affairs*, 1925, vol. i, p. 212 et seq.

conducted not by the League but by Poland. It is therefore difficult to regard Danzig as a true protectorate either of the League or of Poland; Poland, if she protects Danzig at all, does so only as the agent of the League, and she is bound also to make on behalf of Danzig any treaty that Danzig may demand, unless Polish interests would be seriously prejudiced thereby, and of this the League's Commissioner is the judge. Danzig, therefore, is a good example of a state whose status can be described but not classified; we can only say that it is a state whose independence has been limited, partly in the interests of Poland, and partly to enable the League to fulfil its duty of protection.

§ 5. *The International Status of the British Dominions.*[1]

Recent events make it difficult to define the international status of the Empire. At least constitutionally the autonomy of its self-governing parts is now as complete as it can be made. The Imperial Conference of 1926 defined their status as 'autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations'; and in 1931 the Statute of Westminster translated this definition into law. But the international unity of the Empire, though its preservation has become more difficult, is not necessarily

[1] Cf. Keith, *The Governments of the British Empire*, pp. 86–106.

inconsistent with the constitutional autonomy of its several parts.

In one international sphere at least, that of the League of Nations, it seems clear that unity no longer exists. The Dominions (except Newfoundland) and India are members of the League in their own right, and Australia, South Africa, and New Zealand hold mandates from, and report on them to, the League. But the League, as Professor Keith points out, is open to 'any fully self-governing state, dominion, or colony', and we cannot with certainty conclude that an independent status within the League involves an independent status for all purposes of international law.

Even outside the League, however, the Dominions often act as separate units. The Imperial Conferences of 1923 and 1926 recognized their separate treaty-making rights, providing only for consultation when a treaty affects another part of the Empire. The right of separate diplomatic representation in foreign capitals is admitted and in a few cases exercised. At international conferences they are now normally represented by separate delegations, though hitherto it has been usual for their delegates to be formally appointed by the King on the advice of the Foreign Secretary, though chosen by their own governments. Even this symbol of unity, however, which hardly accords with complete equality of status, seems likely to disappear in future.

A possible view of the effect of these developments is that the Empire constitutes a 'personal union', that

is to say, a number of independent states united only by the fact that they happen to have the same person as King, like Great Britain and Hanover from 1714 to 1837. But there are objections to such a conclusion. The single Crown is not a merely accidental link; in the words of the preamble to the Statute of Westminster, it is 'the symbol of the free association of the members' of the Commonwealth, and the 'constitutional position' is that any alteration in the law touching the Succession to the Throne or the Royal Title requires the assent of all of them. Moreover, Great Britain still acts frequently for the whole Empire in foreign affairs; and the Conference of 1926 'frankly recognized that in this sphere, as in the sphere of defence, the major share of responsibility rests now, and must for some time continue to rest with His Majesty's Government in Great Britain'. Some Dominions, for example New Zealand, prefer to leave their foreign relations to Great Britain, and all do so in great measure for two practical reasons: firstly, because foreign affairs require a world-wide diplomatic service and none of the Dominions has hitherto chosen to incur the expense of establishing one; and secondly, because the unity of the Empire, which most of them at any rate desire, cannot be maintained unless on major questions of foreign policy it speaks with one voice. Consultation may do something to secure a common imperial foreign policy, but the governments of the Empire have not yet instituted any machinery for the discussion of foreign affairs among themselves which is even comparable to the

diplomatic intercourse of two independent states; the Dominions take little interest in general foreign policy, except when it touches their special interests nearly and obviously, and they dislike incurring international responsibilities; and finally, foreign policy often requires quick decisions and consultation involves delay.

The present position, therefore, appears to be that the Dominions act internationally as separate states when they choose to do so. Apart from this they acquiesce in the conduct of the foreign affairs of the whole Empire by the Government of Great Britain, but on the understanding that they will not be committed to any active obligations without the assent of their own governments. Thus, at the Conference of Lausanne in 1923, the Dominions were not separately represented, and Canada refused to approve the ratification of the treaty of peace with Turkey. But Canada does not regard herself as still at war with Turkey; her official attitude probably is that the treaty has made peace for Canada as well as for Great Britain, but that as she had no share in framing it she accepts no active obligations under it.

Unfortunately, the problem of imperial foreign relations is not merely a domestic one, since it affects the interest of foreign states, and they may not always be content that the Empire should regard itself as one state or many at its own convenience.

In the last resort foreign policy determines the question of war or peace, and if one part of the Empire should become involved in war the question whether the Empire is to be a single state or many might

demand an immediate answer. This, however, is a question which, if it should ever unfortunately arise, would probably be determined by the political circumstances of the time without much regard to the bare legal position. But if a legal answer is to be attempted, it seems probable that one part of the Empire, though it cannot be compelled to take an active part in a war against its will, cannot legally be neutral when another is at war. A declaration of neutrality in such an event would be a political act equivalent to a declaration of secession; and whether it could take effect as a secession would probably depend more on the convenience of the other belligerent than on the acquiescence of Great Britain.

§ 6. *Commencement of the existence of a State.*

A new state comes into existence when a community acquires not momentarily, but with a reasonable probability of permanence, the essential characteristics of a state, namely, an organized government, a defined territory, and such a degree of independence of control by any other state as to be capable of conducting its own international relations. Occasionally a new state has been formed in territory not previously under the rule of any state; as when in 1836 Boers from Cape Colony trekked northwards and founded the South African Republics, or when in 1847 emancipated Negroes from the United States founded the Liberian Republic. But generally in modern times a new state has been formed by the division of an existing state into more states than one.

Whether or not a new state has actually begun to exist is a pure question of fact; and as international law does not provide any machinery for an authoritative declaration on this question, it is one which every other state must answer for itself as best it can. Sometimes the circumstances make the answer obvious; as when the union between Sweden and Norway was dissolved by agreement in 1905, and each of these countries commenced a separate international existence. But often the question is both difficult and delicate, especially when part of an existing state is forcibly endeavouring to separate itself from the rest; for a premature recognition of the independence of the revolting part would be an unwarrantable intervention in the internal affairs of the other state. It is impossible to determine by fixed rules the moment at which other states may justly grant recognition of independence to a new state; it can only be said that so long as a real struggle is proceeding, recognition is premature, whilst on the other hand mere persistence by the old state in a struggle which has obviously become hopeless is not a sufficient cause for withholding it.

The legal significance of recognition is much discussed. According to one view it has a 'constitutive' effect; 'through recognition only and exclusively a state becomes an international person and a subject of international law; and thereby acquires the capacity to enter into diplomatic relations and make treaties with the states which recognize it'.[1] But there are

[1] Oppenheim, *International Law*, 4th ed., vol. i, p. 144.

serious difficulties in this view. The status of a state recognized by state A but not recognized by state B and therefore apparently both an 'international person' and not an 'international person' at the same time, would be a legal curiosity. Perhaps a more substantial difficulty is that the doctrine would oblige us to say that an unrecognized state has neither rights nor duties at international law, and some of the consequences of accepting that conclusion might be startling. We should have to say, for example, that an intervention, otherwise illegal, would not be illegal in Manchukuo, or that if Manchukuo were to be involved in war, she would be under no legal obligation to respect the rights of neutrals. Non-recognition may certainly make the enforcement of rights and duties more difficult than it would otherwise be, but the practice of states does not support the view that they have no legal existence before recognition.[1]

The truth seems to be that the granting of recognition to a new state is a political rather than a legal act. It does not bring into legal existence a state which did not exist before, and a state may exist as a state without being recognized. A new state has no legal right to recognition. The primary function of recognition is formally to acknowledge as a fact something which has hitherto been uncertain, namely, the independence of the state recognized, and to declare the recognizing state's readiness to accept the normal consequences of that fact, namely, the usual courtesies of international intercourse. But in practice, and more

[1] See on this point Jaffe, *Judicial Aspects of Foreign Relations*, at p. 98.

especially in recent years, non-recognition does not always imply that the existence of the unrecognized state is a matter of doubt. States have discovered that the granting or withholding of recognition can be used to further a national policy; they have refused it as a mark of disapproval, as at present in the case of Manchukuo; and they have granted it in order to establish the very independence of which recognition is supposed to be a mere acknowledgement, as when in 1903 the United States recognized Panama only three days after it had revolted from Colombia and at the same time took steps to prevent the re-establishment of Colombian sovereignty.

The recognition of a new state as independent must be distinguished from the recognition as belligerent of part of a state when in rebellion against its legitimate government. In normal circumstances the existence of a rebellion within a state is a domestic matter with which other states have no concern, but it sometimes takes a form in which this attitude of detachment can no longer be fairly demanded of them. Two conditions must be satisfied before an outside state is justified in acting. In the first place the operations must have reached the dimensions of an actual war; that is to say, the insurgents must be organized under a government which controls a certain territory of its own, which sees that the laws of war are observed by its troops, and in general which is acting for the time being like the government of an independent state at war. There need be no assurance of this government's permanence, for that is clearly a matter

which can only be determined by the issue of the war. In the second place the course of the war must be such that other states cannot simply stand aside from it. This may happen even if hostilities are confined to the land; for example, the troops of one party may cross the frontier of a neighbouring state and thus compel that state to decide whether to intern them, which would be to recognize them as belonging to an army at war, or to leave them at large, which is likely to be a dangerous course for itself. When the war extends to the sea, it is almost inevitable that any state which possesses a mercantile marine will be compelled to make a decision for or against the recognition of the insurgents, since it will have to decide whether or not to allow the exercise against its own subjects of the rights which the existence of a maritime war gives to belligerents. If it allows their ships to be searched for contraband goods or captured for breaking a blockade, it thereby recognizes the existence of a regular war, because nothing but war could render those acts permissible: if it refuses, it may have to back its refusal by force and thus be drawn into the war. Its position would be intolerable if it could be required to allow belligerent rights only to the legitimate government and to refuse them to the insurgents, since that would be to force it to take sides in the quarrel. In such circumstances, therefore, other states are within their rights in declaring themselves neutral in the struggle, and since there can be no neutrals unless there are two belligerents, such a declaration is equivalent to a recognition of the belligerency of both parties.

The effect of a recognition of belligerency is that the state giving it demands and accepts for itself all the consequences which follow from the existence of a regular war; it claims the rights of a neutral, and accords the rights of a belligerent to the warring parties. Further, the act is also advantageous to the state against whom the rebellion is made, since it is relieved thereby of responsibility for the acts of its own insurgent subjects towards other states. But the effects of the recognition are purely provisional; it puts both belligerent parties in the position of states, but only for the purposes and for the duration of the war. It differs radically, therefore, from a recognition of the revolting part of a state as independent. None the less the granting of recognition of belligerency to insurgents is a step often resented by the state to which they belong, and its judgement of the propriety of the recognition is likely to differ from that of the recognizing state. The choice of the time for granting recognition is therefore a delicate matter. The test has been already indicated; recognition is justified when an actual war is being waged and when the state granting it is, or seems likely to be, forced into a position where it cannot avoid taking some action, either recognition or refusal of recognition, in relation to the war.

§ 7. *Continuity and Termination of the existence of a State.*

The government of a state must not be identified with the state itself, but between states intercourse is only possible if each has a government with which the others may enter into relations and whose acts they

may regard as binding on the state itself. What form of government a state should adopt, and whether it should replace an existing government by a new one, are domestic matters with which other states are not concerned. But they are concerned to know whether the person or persons with whom they propose to enter into relations are in fact a government whose acts will be binding at international law upon the state which they profess to represent.

The law regarding this question has been clearly stated in an award of Chief Justice Taft in an arbitration between Great Britain and Costa Rica in 1923 (reported in *American Journal of International Law*, 1924, p. 147). Great Britain claimed that certain British companies had acquired certain rights against Costa Rica by contracts entered into with one Tinoco. It appeared that in 1917 Tinoco overthrew the existing government of Costa Rica and established a new constitution which lasted till 1919, when the old constitution was restored; and that in 1922 the restored government passed legislation nullifying all engagements entered into by Tinoco's government. The Chief Justice held that if Tinoco's government was the actual government of Costa Rica at the time when the rights were alleged to have been acquired, the restored government could not repudiate the obligations which his acts had imposed on the state of Costa Rica. He further said that this question must be decided by evidence of the facts. It was immaterial that by the law of Costa Rica Tinoco's government was unconstitutional. Even the objection put for-

ward by Costa Rica that many states, including Great Britain herself, had never recognized Tinoco's government, was only relevant as suggesting that that government had not been the actual government of Costa Rica; but since Tinoco 'was in actual and peaceable control without resistance or conflict or contest by any one until a few months before the time when he retired', he held that his acts were binding upon Costa Rica, although on the further question of the merits of the companies' claims, his decision on the whole favoured that state.

This decision therefore shows that a state is bound internationally by the acts of the person or persons who in actual fact constitute its government. This is sometimes expressed by saying that a new government 'succeeds' to the rights and obligations of its predecessor, but the expression is a loose one, because international rights and obligations belong to states and not to governments, and a new government 'succeeds' to them only in the sense that it becomes the government of a state to which they are attached. It follows, therefore, that the identity of a state is not affected by changes in the form or the personnel of its government, or even by a temporary anarchy, as in China or Mexico in recent years. But constitutional changes may make it difficult for other states to know who, if any one, is in a position to bind the state, and may thus give rise to the problem of deciding whether or not they will recognize a new government. The recognition of a new government is not to be confused with the recognition of a new state, but, as we shall see,

it raises problems in some respects similar. In both cases a premature recognition is an intervention in the domestic affairs of another state, and in both the question which other states have to decide is one of fact. Recognition of a government, again, like recognition of a state, is a political rather than a legal act, and it also is capable of being used as an instrument of policy; for example, the United States has at times, especially under President Wilson, refused to recognize new governments which have been set up by force in Central America. But to refuse to recognize facts because they are unpleasant is apt to be inconvenient, and such a policy is difficult to carry out consistently for long or against any but weak states, as those states which refused to recognize the government of the Soviets, including the United States itself, eventually discovered. The fact that a state, though it may be reluctant to recognize an actual government in another state, is virtually forced to do so because the alternative is the very inconvenient one of having no official relations at all with the other state has given rise to a diplomatic distinction between recognition *de jure* and recognition *de facto*, but there is no legal difference between these two forms. By granting recognition *de facto* a government merely offers to enter into business relations with another, but without cordiality and without the usual courtesies of diplomacy.

But non-recognition of a foreign government is rather more than a refusal to enter into relations. From 1917 to 1921 Great Britain refused to recognize

the Soviet government. In 1921 we recognized that government as the *de facto*, and in 1924 as the *de jure*, government of Russia. In 1927 we broke off diplomatic relations with it. That action did not mean that we ceased to recognize the Soviet Government as the government of Russia; we merely declined to deal with that Government. It has, however, been pointed out[1] that non-recognition as practised to-day (that is to say, when it is used for some ulterior political purpose, and not because the stability of the government in question is really a matter of doubt) differs very little from the breaking off of diplomatic relations, and this seems to be true so far as the international consequences of either are concerned; and that it may be largely a matter of chance, depending on whether it is a new or an old government which displeases us, which will be used.

But if the international significance of recognition, whether of a state or of a government, is political rather than legal, recognition has important indirect effects, at any rate according to English and American views, in the administration of the municipal law of the recognizing state. The representatives and the property of a recognized foreign state or government are immune from legal process, and the validity of such a government's acts in its own country cannot be questioned in our courts. Our courts moreover regard it as a matter for the Executive and not for themselves to determine whether an entity claiming to be a state, or persons claiming to be a government,

[1] Cf. Jaffe, loc. cit., p. 148.

ought to be treated as a state or government for these purposes. Thus in *Luther* v. *Sagor* the English courts had to deal with a claim to certain timber which had been the property of the plaintiff company in Russia; it had been confiscated by legislation of the Soviet government, sold by them, and subsequently brought to England by the purchaser. At the time when the case was heard by Roche J. the British government had not recognized the Soviet government, and he accordingly gave judgment for the plaintiffs. But before the case was heard by the Court of Appeal the Soviets had been recognized with retrospective effect as a *de facto* government, and the Court therefore reversed the decision of Roche J., holding that the Soviet legislation had been effective to pass the title in the timber. ([1921] 1 K.B. 456 and 3 K.B. 532.)

A change in the extent of a state's territory again has in principle no effect on its international identity, but in practice difficult cases may occur. Thus when two states become united, it may not always be easy to determine whether one of the two has annexed the other, or whether both have merged their separate identities so as to form a single new state. For instance, it might seem natural to regard the kingdom of Italy as a new state formed by the union of the several independent states of the Italian Peninsula, but in fact she regards herself as, and has been accepted as being, the kingdom of Piedmont territorially enlarged by annexation of the other Italian states.[1] Similarly,

[1] See, e.g., the case of *Gastaldi* v. *Lepage Hemery*, Annual Digest, 1929–30, Case No. 43.

when one existing state breaks up into more than one it may be difficult to say whether the old state has been extinguished and its place taken by two or more new states, or whether the old state continues to exist with its territory reduced by the separation from it of a new state or states. The present republic of Austria is probably a new state, and not the old Empire of Austria-Hungary with a new form of government and a reduced territorial extent. On the other hand, the present Turkish republic seems to be regarded as a continuation of the former Turkish Empire, in spite of the many new states which have been carved out of its former territories.[1]

In all cases of the transfer of territory from one state to another, whether the event involves the extinction of a state or not, the point of chief legal interest is to determine the effect, if any, of the transfer on the international rights and duties of the states concerned. This question is often regulated by the provisions of a treaty of cession, but unless so regulated it does not admit of a simple answer, and the problems which it raises cannot be solved by assuming a general principle of 'state succession' and then proceeding to deduce its consequences. 'Succession' is primarily a principle of private law, and suggests that the extinction of a state is in some sense comparable to the death of an individual. But states do not die in any literal sense; their population and their territory do not disappear, but merely suffer political change. Moreover,

[1] See *Ottoman Debt Arbitration*, Annual Digest, 1925–6, Case No. 57.

succession is a notion taken from the law of property; and it is easy to be misled by the suggestion that something analogous to the transfer of property takes place when people and territory cease to form part of one state and begin to form part of another. It is safer to proceed by examining the actual practice of states to see how far any fixed rules have been formed on this matter. We may treat it under the heads of treaties, property, contracts, and wrongs.

The mere cession of a piece of territory from one state to another has in general no effect on the treaty rights or obligations of either. Nor are the rights and obligations affected when part of an existing state breaks off and becomes a new state; they remain with the old state, and the new state starts its career without any. Further, when a state ceases to exist, its treaties generally cease with it. This is admitted in the case of political treaties, for example, treaties of alliance; and there is very little authority for the suggestion that non-political treaties pass to the state or states which take the place of the extinguished state. Thus in 1896 when France annexed Madagascar she applied the French tariff, disregarding certain trading rights to which Great Britain and the United States were entitled by treaties with the Queen of Madagascar; and Japan acted in the same way when she annexed Korea in 1910. One class of treaty, however, is alleged to constitute an exception to this principle, but even this is doubtful. There are treaties, sometimes called 'dispositive' treaties, which are regarded as impressing a special character on the territory to

which they relate, and creating something analogous to the servitudes or easements of private law; and there is some authority for saying that when a state takes over territory affected by a treaty of this kind it takes over not the mere territory itself, but the territory with rights and obligations attached to it. A treaty of neutralization is an example of such a treaty.

State property situated within the transferred territory, such as public buildings, government funds in the banks, or state railways, passes to the annexing state; or, if a state ceases to exist, then all its property, wherever situated, passes to the state to which the sovereignty over its territory has passed. This principle was applied after the American Civil war to property of the Confederate government situated in England, when the British government handed over to the United States the Confederate cruiser *Shenandoah*, which had taken refuge in Liverpool, and it would appear to be as applicable to the event of a state annexing another state as to that of a state reasserting its authority over an insurgent government.

How far an annexing state takes over the contractual rights and liabilities of a state whose territory it annexes is a question of much difficulty. Oppenheim[1] was of opinion that 'the recent practice of states . . . tends to establish as a rule of international law the duty of a successor state, whether the succession arises upon cession or annexation or dismemberment, to respect the acquired rights of private persons whether proprietary, contractual, or concessionary'. On the

[1] Oppenheim, *International Law*, vol. i, 4th ed., p. 168 (note).

other hand, an English court in *West Rand Central Gold Mining Co.* v. *the King*[1] adopted a contrary but equally extreme position, and declared that 'the conquering sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them.' The former of these views is probably in advance of, but the latter is certainly behind, the actual state of international law on this matter.

The Permanent Court has more than once had occasion to refer to the question, though it has not yet formulated any comprehensive rule; probably no rule applying indifferently to contractual rights and liabilities of all kinds is to be expected. In the case of the *German Settlers in Poland*,[2] after declaring that 'private rights acquired under existing law do not cease on a change of sovereignty', the Court upheld as against Poland the rights of certain German settlers in the territory transferred from Prussia after the War. These settlers held their lands upon a special form of contract with the Prussian State which entitled them on certain conditions to a transfer of the full ownership thereof, and the contracts were upheld notwithstanding the fact that they had originally been made for the purpose of strengthening the German at the expense of the Polish element in the territory which had since become part of Poland. In the case of the

[1] [1905] 2 K.B. 391. The case is open to many criticisms, and the actual decision did not require so sweeping a generalization.

[2] Series B (Advisory Opinions), No. 6.

Mavrommatis Palestine Concessions[1] the Court held that the Administration of Palestine was bound to respect certain concessions granted by Turkey to a Greek subject for works to be carried out at Jerusalem. The Court has not yet had to deal with the assumption by a successor of the public debt of an annexed state, or of a proportionate part where part only of a state's territory is transferred. On this matter practice has varied, though it seems to be tending towards the acceptance of at any rate some liability. Sometimes an annexing state has recognized a legal obligation to accept liability; Italy appears to have done so when she took over from Austria the local debt of Lombardy in 1860. Sometimes it has taken over part of a state's general debt on annexing territory, although the debt was not charged on the territory; thus Prussia took over part of the Danish debt when she annexed Schleswig-Holstein in 1866. Sometimes it has accepted partial liability without admitting any legal obligation to do so; Great Britain acted in this way after the South African war. Possibly the solution of the matter is to be found by considering the nature of the contract, and particularly whether the identity of the original contracting state is or is not a material element in it. Thus it is generally assumed that an annexing State is not bound to take over a public debt incurred for the purpose of financing a war against itself. On the other hand, in a concession contract for the execution of works of public utility, as in the *Mavrommatis* case, or in a sale of lands, as in

[1] Series A, Judgment No. 5.

the *German Settlers'* case (apart from the political purpose in that case, which the Court disregarded), the identity of the contracting state is immaterial. But it must be admitted that this distinction is not definitely formulated in the cases.

A decision of the Anglo-American Pecuniary Claims Tribunal, established under a convention of 1910, has dealt with the question of the liability of an annexing state for the wrongful acts of the state whose territory is annexed. Before the annexation of the South African Republic by Great Britain a quarrel broke out between the government of President Kruger and the courts of the Republic, in the course of which he dismissed the Chief Justice from office and reduced the courts to a state of dependence on the executive government. The Tribunal found as a fact that in consequence of this state of 'legal anarchy', an American citizen, Robert E. Brown, suffered a denial of justice in connexion with certain gold-mining claims. The United States now preferred Brown's claim against Great Britain as the successor of the South African Republic. It was admitted by the American agent that there is no general liability at international law for the torts of a defunct state; but the Tribunal, in dismissing the claim, went further, and held that a state acquiring territory by conquest is under no obligation to take affirmative steps to right a wrong that may have been committed by its predecessor.[1] The law on this point is reasonably clear.

[1] 'The Robert E. Brown Claim': *British Year-Book of International Law*, 1924, p. 210.

V

THE TERRITORY OF STATES

§ 1. *Territorial 'Sovereignty'.*

AT the basis of international law lies the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of other states. When a state exercises an authority of this kind over a certain territory it is popularly said to have 'sovereignty' over the territory, but that much abused word is here used in still another derivative sense. It refers here not to a relation of persons to persons, nor to the independence of the state itself, but to the nature of rights over territory: and in the absence of any better word it is a convenient way of contrasting the fullest rights over territory known to the law with the minor territorial rights to be later mentioned. Territorial sovereignty bears an obvious resemblance to ownership in private law, less marked, however, to-day than it was in the days of the patrimonial state, when a kingdom and everything in it was regarded as being to the king very much what a landed estate was to its owner. As a result of this resemblance early international law borrowed the Roman rules for the acquisition of property and adapted them to the acquisition of territory, and these rules are still the foundation of the law on the subject.

§ 2. *Modes of Acquiring Territory.*

The most important modes are Occupation and Cession; it will be necessary also to consider shortly Conquest, Prescription, and Accretion.

Occupation is a means of acquiring territory not already forming part of the dominions of any state. Since all the habitable areas of the earth now fall under the dominion of some state or other, future titles by occupation are not likely to be frequent, but the law of the matter is still important because the occupations of the past often give rise to the boundary disputes of the present. The principles of law are fairly well settled; the difficulty of a boundary dispute generally arises in applying them to the facts, which may go back for centuries. In what is now the leading case on the subject, the judgment of the Permanent Court on the *Legal Status of Eastern Greenland*,[1] it was necessary to go back to events of the tenth century A.D.

The Eastern Greenland Dispute arose out of the action of Norway in 1931 in proclaiming the occupation of certain parts of East Greenland. Denmark thereupon, acting under the Optional Clause of the Court's Statute,[2] asked the Court to declare the Norwegian proclamation invalid, on the ground that the area to which it referred was subject to Danish sovereignty, which extended to the whole of Greenland. The Court pointed out that a title by Occupation involves two elements, 'the intention or will to

[1] Series A/B, No. 53. [2] *Infra*, p. 215.

act as sovereign, and some actual exercise or display of authority'. In these words the Court were affirming a well-established principle of law, namely, that Occupation, in order to create a title to territory, must be 'effective' occupation, that is to say, it must be followed up by action, such as, in a simple case, the planting of a settlement or the building of a fort, which shows that the occupant not only desires to, but can and does, control the territory claimed. The Court were satisfied on the evidence that at any rate after a certain date, 1721, Denmark's *intention* to claim title to the whole of Greenland was established. But the areas in dispute were outside the settled areas of Greenland, and it was necessary therefore for the Court to examine carefully the evidence by which Denmark tried to satisfy the second necessary element in Occupation, namely the exercise of authority. On this they pointed out that the absence of any competing claim by another state (and until 1931 no state other than Denmark had ever claimed title to Greenland) is an important consideration; a relatively slight exercise of authority will suffice when no state can show a superior claim. They held too that the character of the country must be regarded; the Arctic and inaccessible nature of the uncolonized parts of Greenland made it unreasonable to look for a continuous or intensive exercise of authority. Denmark was able to show numerous legislative and administrative acts purporting to apply to the whole of Greenland; a number of treaties in which other states, by agreeing to a clause excluding Greenland from their effects, had appa-

rently acquiesced in her claim; and in recent years an express recognition of it by many states; and the Court held that in the circumstances this was sufficient evidence to establish her title to the whole of the country. The area which Norway claimed in 1931 was therefore not at that time a *terra nullius* capable of being acquired by her occupation.

On principle the area to which the legal effects of an occupation extend should be simply the area effectively occupied, and this is a question of fact. But politically a strict adherence to this principle is impracticable; a state which has effectively occupied a certain area may reasonably intend to extend it, or it may be that the security of the area occupied would be threatened if another state should occupy adjacent unoccupied territory. Hence states have usually claimed title to an area greater than that effectively occupied, and though the claims have often been extravagant the law recognizes some extension as reasonable. Mr. Hall's statement on this matter is as definite as it can safely be made, when he says that 'a settlement is entitled, not only to the lands actually inhabited and brought under its immediate control, but to all those which may be needed for its security, and to the territory which may fairly be considered to be attendant upon them'.[1]

From the requirement that Occupation must be 'effective' it follows that mere discovery of an unappropriated territory is not sufficient to create a title, for discovery alone does not put the discoverer in a

[1] *International Law*, 8th ed., p. 129.

position to control the territory discovered, however he may desire or intend to do so. But on this point the law makes a concession and allows the strict rule of effective occupation to be qualified by the doctrine of 'inchoate title'. Since an effective occupation must usually be a gradual process it is considered that some weight should be given to mere discovery, and it is regarded therefore as giving an 'inchoate title', that is to say, a temporary right to exclude other states until the state of the discoverer has had a reasonable time within which to make an effective occupation, or a sort of option to occupy which other states must respect while it lasts.

The effects of discovery were discussed by the arbitrator (M. Huber) in the *Island of Palmas* award.[1] The United States, as successor of Spain, claimed an island which lies half-way between the Philippines and the Dutch East Indies, mainly on the ground of its discovery in the sixteenth century. The arbitrator held that even if the international law of that century recognized mere discovery as giving a title to territory (though there is very little reason for thinking that it did), such a title could not survive to-day, when it is certain that discovery alone, without any subsequent act, does not establish sovereignty; whilst if the title originally acquired was 'inchoate' (as according to the modern doctrine it would be) it had not been turned into a definitive title by an actual and durable taking of possession within a reasonable time. It could not therefore on either view prevail over the

[1] Text in *A.J.* 1928, p. 867.

continuous and peaceful display of authority, which the evidence satisfied him had been exercised by Holland.

Cession is a mode of transferring the title to territory from one state to another. It results sometimes from a successful war, sometimes from peaceful negotiations; it may either be gratuitous, or for some consideration, as when Denmark sold the Danish West Indies to the United States in 1916.

Conquest is the acquisition of the territory of an enemy by its complete and final subjugation and a declaration of the conquering state's intention to annex it. In practice a title by conquest is rare, because the annexation of territory after a war is generally carried out by a treaty of cession, although such a treaty often only confirms a title already acquired by conquest. A modern instance of title by conquest is that of Rumania to Bessarabia.

There is an obvious moral objection to the legal recognition of a title by conquest, but it is no greater than the moral objection to the recognition of an enforced cession of territory. That the latter has in the past conferred a valid legal title is undeniable, and it would have been idle for the law to have accepted the effects of force when the formality of a forced assent had followed and not otherwise. The attitude of the law towards both these titles has been merely a corollary, but a necessary corollary, of its attitude towards war, which it has been obliged to tolerate as a method of settling disputes. It is clear, however, that both these titles will disappear from the law if the future

practice of states is in accordance with their solemn undertakings in the Pact of Paris, 1928. On the other hand, if the Pact is not observed, and if war continues to be used as an instrument of national policy, it is certain that it will continue to produce the same results as it has in the past; one of these results will be the annexation of territory, and the question what in that event is to be the attitude of the law towards conquest or enforced cession will become important.

It was proposed in 1932 by Mr. Stimson,[1] then American Secretary of State, and his proposal has come to be known as the *Stimson Doctrine of Non-Recognition*, that states should refuse to recognize 'any situation, treaty or agreement which may be brought about contrary to the covenants and obligations of the Pact of Paris'. Thereby, he said, 'a caveat will be placed upon such actions which, we believe, will effectively bar the legality hereafter of any title or right sought to be obtained by pressure or treaty violation'.

The importance of these statements as a declaration of policy is great, but the legal consequences which Mr. Stimson foresaw for the policy seem less certain. For if non-recognition should leave unchanged the facts of which it marks disapproval, it would result in a discordance between the law and the facts which in the long run would merely advertise the impotence of the law. What have hitherto been the legal consequences of war cannot be avoided by any change in

[1] For the circumstances of this declaration see Toynbee, *Survey of International Affairs*, 1932, p. 540 et seq.

the law which does not also register a change in the practice of states towards war.

Prescription as a title to territory in international law is so vague that some writers deny its recognition altogether. Certainly no rules exist as to the length of possession necessary to create a title; but here also, as in its attitude towards the effects of conquest, the law in the interests of general international order must recognize facts; it must and does accept the long-continued definitive possession of territory as a good root of title, without regard to its origin, as municipal law does by statutes of limitation.

Accretion is the addition of new territory to the existing territory of a state by operation of nature, as by the drying up of a river or the recession of the sea. It is of little importance and the detailed rules on the matter need not here be considered.

§ 3. *Minor Rights over Territory.*

(a) *Colonial protectorates.*

In the latter half of the nineteenth century the appetites of the colonizing states of Europe for new territory in Africa outran their powers of digestion, and they introduced forms of staking out their claims in territories where for one reason or another they were for the time being unable or unwilling to make an effective occupation. One such device was the invention of 'colonial protectorates', the word 'protectorate' here describing a relation between a state and a native community not sufficiently civilized to be regarded as

a state, and not, as heretofore, a relation of dependence between two states. As Westlake caustically remarks:

'The name had the double advantage of giving a flavour of international law to a position intended to exclude other states before such exclusion could be placed on the ground of duly acquired sovereignty, and at the same time of allowing that position to be abandoned with less discredit than attaches to the abandonment of sovereignty, if the country should be found less valuable than had been hoped.'[1]

For the most part these new protectorates were established by agreements more or less voluntary with the native chiefs, and they generally lead to full annexation when the protecting state is ready for that step. In the meantime it claims to exclude any other state from making an occupation, or from maintaining any direct relations with the protected communities; conversely it accepts a somewhat vague obligation to maintain a reasonable degree of security for foreign subjects and property within the protected territory.

(b) *Spheres of influence.*

Even the relaxation of the rules relating to occupation introduced by the establishment of colonial protectorates did not satisfy the appetites of the colonizing powers; and they invented an even more indefinite method of staking out their claims under the name of 'spheres of influence'. The very purpose of this device was that its incidents should be vague; and it means no more than that a state, without establishing its juris-

[1] *International Law*, Part I, p. 120.

diction or undertaking any responsibility for securing good government, signifies that it regards certain territory as closed to the ambitions of any other power, probably because it intends some day to convert it into a colony or protectorate, or because it regards it as strategically necessary to the security of part of its existing dominions. The mere assertion of a sphere of influence gives the influencing state no rights over the territory and is a political and not a legal act; but in practice the claim is often protected by treaties with the states most likely to be affected, and in any case to disregard it would be an unfriendly act.

(c) *Leases.*

Leases of territory by one state to another which closely resemble the ordinary leases of private law, for example, leases of specified areas in ports for transit purposes, are not uncommon; but there are other leases, political in character, in which it is usual to regard the use of the term as no more than a diplomatic device for rendering a permanent loss of territory more palatable to the dispossessed state by avoiding any mention of annexation and holding out the hope of eventual recovery. In 1898 China leased Kiao-Chau to Germany and other territories to Great Britain, France, and Russia, the Russian lease being transferred to Japan in 1905, and the German in 1919. But it has been justly pointed out by a recent writer[1] that this interpretation of the Chinese leases is

[1] Lauterpacht, *Private Law Sources and Analogies of International Law*, pp. 183–90.

inadmissible. Not only did China by the terms of the leases themselves retain and actually exercise more than a nominal sovereignty over the leased territories; but even if the lessee states intended the leases as disguised cessions, this was certainly not the intention of the lessor, China, and we are not entitled to estimate the legal character of a transaction by conjecturing the undisclosed intentions of one of the parties only. Moreover, the event seems to have confirmed the straightforward construction of these leases, for at the Conference of Washington in 1922 the restitution of most of the territories to China was promised. In 1930 Great Britain returned to China the leased territory of Weihaiwei.

(d) *Mandates.*

Article 22 of the Covenant of the League of Nations created a new status for those territories surrendered by Germany and Turkey to the Principal Allied and Associated Powers 'which are inhabited by peoples not yet able to stand by themselves'. The guiding principle of the new institution is declared to be that the well-being of these peoples forms a 'sacred trust of civilization'; and this trust is carried out by placing them under the 'tutelage' of different members of the League as 'mandatories on behalf of the League'.

There are thirteen mandates, divided into three classes known as A, B, and C. The A mandates consist of the French mandate over Syria, and the British mandate over Palestine. These countries are described, in the Covenant, not very ingenuously, as 'independent

nations', but 'subject to the rendering of administrative advice and assistance until such time as they are able to stand alone'. The relation may be described as a 'responsible' protectorate; the mandatory state, unlike a protecting state, is in theory disinterested, and it assumes obligations, as well as rights, both to the population under mandate and to the League. The A mandates differ considerably from one another, and that over Palestine is in many respects closer to the B mandates than to the A to which it nominally belongs. In Palestine itself Great Britain does not merely 'advise and assist', but appoints, the local government, though that government maintains separate foreign relations and the population have their own Palestinian nationality.

On the other hand, the territory of Transjordan is administered by an Arab Emir who is advised by a British Resident, and to all intents and purposes it has come to constitute a separate mandated territory, although included in the Palestine mandate. The Palestine mandate is also anomalous in that it directs the mandatory to further the establishment therein of a 'Jewish national home', a policy which the mandatory power must reconcile with its obligations to the Arab inhabitants of the country as best it can.

It was originally intended to create a third A mandate of Great Britain over Iraq, but owing to Iraqi opposition no actual mandate ever came into force, and the relations between Great Britain and Iraq were regulated by treaty, though Great Britain accepted the responsibilites of a mandatory power

towards the League. In 1932 Iraq was admitted as a member of the League on giving certain guarantees for the protection of her minorities and for the rights of foreigners, and the quasi-mandate was replaced by a treaty of alliance with Great Britain, the terms of which were submitted to the League.

The B and C mandates apply to peoples not sufficiently advanced to be regarded as states. Class B comprises the Central African territories (Tanganyika, Cameroons, Togoland), and here the mandatory administers the territory, but is bound to prohibit such abuses as slave-trading, arms and liquor traffic, and military training of the natives except for police purposes and for the defence of the territory. The French mandates for Cameroon and Togoland, however, contemplate the use of defensive levies outside the territories. Class C comprises South-west Africa, and certain Pacific islands, which on account of their small population or geographical position it is convenient should be administered as 'integral portions of the mandatory's territory'. The same safeguards for the natives apply to this class. A and B mandates provide for equal trading opportunities for the nationals of all members of the League, and these have been extended to the United States. The C mandates do not contain this provision. The B and C mandates contain no provision for termination.

The mandatory system is an attempt to deal with one of the most difficult of world problems, the relations of the civilized and the backward races. It has many imperfections; for example, the Covenant

provided that the wishes of the communities were to be a principal consideration in the selection of Class A mandatories, but the selection was made by the Allied Powers alone; and clearly if the system is a good one there is no reason why it should be limited to ex-German and Turkish territories. On the other hand it should be remembered that the plan was a compromise between a probably impracticable idealism and the traditional practice of annexation, and it should be judged not by the distance by which it falls short of the insincere rhetoric of Article 22, but by the advance that it marks on previous ideals and practice of colonial administration. States are not charitable institutions, and they do not undertake colonial responsibilities from altruism; but the system stands as an international recognition that their relation with the backward peoples should not be one of mere exploitation.

The supervision of the League is exercised through a Permanent Mandates Commission, consisting of members who hold no office under their own governments, and have a majority drawn from the non-mandatory states. Each mandatory power renders an annual report and is represented by an officer able to give further information at the meetings of the Commission, which has often been outspoken in its criticisms. It has, however, no power to coerce a mandatory power or to verify its report by direct investigation, and it must rely therefore on public opinion and the spirit of co-operation to make its criticisms effective; but it has proved itself a business-like body,

recognizing the difficulties as well as the faults of colonial administration, and accumulating experience from the practice of powers with different colonizing methods which it can place at the service of them all. It would be difficult to strengthen the control of the League over the mandatory powers without weakening the prestige which the government of a backward community must uphold in the interests of the community as much as in its own.

The mandatory system presents many questions of legal interest, not all of which admit of a definite answer as yet. The phraseology used in the Covenant suggests no less than three analogies drawn from private law. 'Mandate' and 'tutelage' are terms of Roman law, and 'trust' belongs to Anglo-Saxon law; but the three are distinct juridical ideas. These analogies must be treated with caution. There has been much discussion of the question of sovereignty over mandated territories; does it reside in the League? but the League did not appoint the mandatory powers, it cannot revoke the mandates, or at any rate it cannot do so at discretion, and it exercises no governing powers in the territories; or in the mandatory powers? but they must account for their actions, the territories are not annexed to their dominions, and the populations do not take their nationality; or in the inhabitants of the mandated territories? but the powers exercised by the mandatory states are inconsistent with any such solution. It is the form of the question, which assumes that sovereignty is an indestructible substance which we shall assuredly find if we look closely enough,

that is at fault. Government under mandate is surely an alternative to, not a species of, government under sovereignty. But this highly abstract question has been capable of raising serious practical difficulties, as when the courts of South Africa had to consider in *Christian* v. *Rex* (1923) whether an inhabitant of mandated territory could be convicted of treason, and decided after an elaborate discussion that a sufficient degree of 'majestas' or sovereignty was possessed by the Union of South Africa to make this legally possible.

§ 4. *Territorial Waters.*

Every state is entitled to regard a certain area of the sea adjacent to its coasts as its territorial waters, but neither the extent of this area, nor its legal status is absolutely settled. We shall deal here with the extent of territorial waters, and with their status in the following chapter.

On the landward side territorial waters are generally measured from low-water mark, but bays and gulfs create an exception to this rule which will require separate consideration. The existence of islands off a coast also makes its application doubtful. The waters surrounding an island are, of course, territorial within the same distance as those that adjoin the mainland; but some states, for example, Norway, claim to measure their territorial waters from the outermost islands lying off their coasts, and to regard the waters between the islands and the mainland as internal waters. Such a claim seems not unreasonable where a large number

of islands, like those which form the Norwegian fiords, are strung along a coast at no great distance from the mainland; but the law on the point is not settled.

The seaward limit of territorial waters is less certain. Historically the theory on which the law of territorial waters was founded has been that they extend to the range within which the sea can be commanded by gunfire from the land. The principle was thus laid down by Bynkershoek in his *De dominio maris* in 1702: *imperium terrae finitur ubi finitur armorum potestas*. But according to the British view this distance became fixed in a definite rule of law about the end of the eighteenth century when the range of artillery was approximately one marine league, and it has not been changed, and cannot now be changed, merely by the increase in the range of artillery. Great Britain therefore adopts one marine league as the extent of her own territorial waters and she refuses to recognize any larger claims by other states. The United States takes the same view, and the Supreme Court has defined the phrase in the Eighteenth Amendment, 'the United States and all territory subject to the jurisdiction thereof' as meaning 'the land areas under its dominion and control, the ports, harbours, bays, and other enclosed areas of the sea along its coast, and a marginal belt of the sea extending from the coast-line outward a marine league' (*Cunard Steamship Company* v. *Mellon* (1923) 262, U.S. 100). Germany also appears to agree with this view, but other countries claim a greater extent, Spain, for example, six miles; and others claim to be entitled to fix for themselves different

zones for different purposes. On this principle, sometimes called the doctrine of the 'Contiguous Zone', which is that upheld by France and Italy, there may be one zone within which fisheries are reserved; another within which measures for the protection of the customs may be taken; another which must be treated as neutral waters in time of war; another for securing the national safety. The theory underlying these claims is perhaps that within the limits of the range of artillery, as that may vary from time to time, a state may fix for itself the extent of the waters over which it will claim jurisdiction, and therefore may fix different extents for different purposes; but it is not always clear in these cases whether a state is claiming a width of marginal sea exceeding three miles as its territorial waters, or whether it is satisfied with that limit and is merely claiming certain special rights of jurisdiction *outside* its territorial waters. It is obvious that the position would be intolerable if states habitually extended their claims to the limits that this theory would make legitimate, but at the Hague Codification Conference of 1930 agreement on the matter proved impossible. A strong argument in favour of a restricted limit lies in the fact, often overlooked by those who discuss the matter in the abstract, that the persons most concerned are the sailors who must try to observe whatever rule is adopted, and that to estimate the distance of a ship from the coast is never easy, and becomes harder the greater the distance from the land. On the other hand an agreement on the matter need not involve agreement on a *uniform* distance irrespective

of the configuration of a coast and the special interests of the coast state.

The line from which territorial waters are measured ceases to follow the sinuosities of the coast when it reaches a bay or other indentation in the coast, both shores of which belong to the same state, and it crosses the waters of the bay from shore to shore. So much is generally admitted, but two important questions regarding bays remain: (i) what is the character of the waters on the landward side of this imaginary line drawn across the bay? and (ii) where is the line to be drawn?

The British view on the former of these questions is that these waters are not 'territorial' waters, but internal or national waters in the full sense. The practical importance of this distinction is that there is no right of passage through internal waters. The principle of the Common Law was laid down by Lord Hale in the seventeenth century in these words: 'that arm or branch of the sea which lies within the *fauces terrae* where a man may reasonably discerne between shore and shore is, or at least may be, within the body of a county'; and it was applied in 1859 in the case of *R.* v. *Cunningham* (Bell's Criminal Cases, 86), where an assault had been committed on a ship at anchor in the Bristol Channel, about two miles from land, and the Court held that it was properly charged as having been committed within the county of Glamorgan. The same view is maintained by the United States, and it does not seem to be expressly disputed by any state.

On the second question no exact rule can be laid down, but guidance may perhaps be derived from Lord Hale's suggestion that a bay is national territory when one can see across it from shore to shore. A moderate-sized bay may therefore be presumed to be national territory, and in many fishery conventions, e.g. the North Sea Fisheries Convention, 1882, a width of ten miles has been taken as the test. This width was also accepted by Great Britain and the United States in 1902, on the recommendation of the arbitrators, in settlement of their controversy about the North Atlantic Fisheries. We may perhaps say, therefore, that the line from which territorial waters are to be measured outwards will probably pass from headland to headland of any bay which is less than ten miles across at its entrance, and from approximately the points where the bay first narrows to ten miles when the entrance is wider than ten miles, but it cannot be said that this is a definite rule. Moreover, there are certain bays, sometimes called 'historic bays', much larger than this, which are certainly national territory. These cases also cannot be determined by any general rule. Most maritime states formerly made extensive claims of this kind, and it is not easy to know whether such claims would be pressed if they were challenged at the present day. England, for instance, has traditionally claimed the 'King's Chambers', or waters lying within an imaginary line drawn from headland to headland round the coast, and the United States Chesapeake and Delaware Bays. An important consideration is to inquire whether the coastal state

has for a long period treated a bay as part of its territory and whether such an appropriation has been acquiesced in by other states; and it was largely on this ground that the Privy Council, in *Direct United States Cable Company* v. *Anglo-American Telegraph Company* (1877), 2 App. Cas. 394, which related to the right to lay a cable inside the Bay of Conception, which has an entrance twenty miles wide, held that the bay formed part of the territory of Newfoundland. In a more recent case, *The Fagerness*, [1927] P. 311, where the question was whether a tort committed in the Bristol Channel, at a point seven and a half miles from the nearest coast and where the Channel is about twenty miles wide, had been committed within the jurisdiction, the Attorney-General informed the Court of Appeal that the Crown did not claim the point as within the jurisdiction, and the action was dismissed on that ground. But the Court disclaimed any intention of laying down any general rule, and Lord Justice Atkin quoted with approval a passage in the arbitral award in the North Atlantic Fisheries Case enumerating considerations relevant to the character of bays:

'The interpretation must take into account all the individual circumstances . . . the relation of its width to the length of penetration inland; the possibility and the necessity of its being defended by the state in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea, and other circumstances not possible to enumerate in general.'

Rather similar to these claims to historic bays are certain claims of states to areas of the bed of the sea outside the ordinary limits of territorial waters. For instance, oyster-beds as far as twenty miles off the east coast of Ireland are regulated by British Acts of Parliament, and sponge-banks in the open sea off Tunis have always been regarded as belonging to the Bey of Tunis. These claims depend for their justification on the effective appropriation of the areas in question. The same principle would justify the making of that part of a Channel tunnel that would not be under British or French territorial waters.[1]

There is little actual authority on the application of the rules regarding territorial waters to straits. If a strait is less than two marine leagues in width it is clearly territorial; but may it be so if it is wider than this? In other words, does a strait fall under the principle of the marginal belt, or under that of bays? Great Britain and the United States seem to have acted on the latter view in 1873, when they agreed on a boundary line which runs between Vancouver and the American coast in the middle of a strait varying in width from ten to twenty miles.[2]

The Dardanelles and the Bosphorus have long had a special status imposed upon them by treaty, and they are now regulated by the Treaty of Lausanne, 1923. Merchant ships enjoy absolute freedom of passage except when Turkey is at war; in that event neutral ships are free to pass, but Turkey has a right

[1] Cf. Hurst, 'Whose is the bed of the sea?' *B.Y.I.L.*, 1923–4.
[2] Cf. Hall, *International Law*, p. 195.

to search them. Warships may pass in time of peace, but no power may send a force greater than the strongest fleet possessed by a Black Sea power; in time of war, if Turkey is neutral, the rule is the same, except that the restriction does not apply to a belligerent state, which, however, may not commit any act of war in the Straits; if Turkey is at war, the rule applies only to neutral states. Demilitarized zones are created on both sides of the Straits. The treaty also created an international 'Straits Commission' acting under the League of Nations, which supervises the observance of these provisions; and Great Britain, France, Italy, and Japan have jointly undertaken to meet a violation of the provisions for freedom of passage or an act of war committed in the Straits 'by every means which the Council of the League of Nations shall decide'.

VI

THE JURISDICTION OF STATES

IN general, every state has exclusive jurisdiction within its own territory, but this jurisdiction is not absolute, because it is subject to certain limitations imposed by international law. The term 'exterritoriality' is commonly used to describe the status of a person or thing physically present on a state's territory, but wholly or partly withdrawn from the state's jurisdiction by a rule of international law, but for many reasons it is an objectionable term. It introduces a fiction, for the person or thing is in fact within, and not outside, the territory; it implies that jurisdiction and territory always coincide, whereas they do so only generally; and it is misleading because we are tempted to forget that it is only a metaphor and to deduce untrue legal consequences from it as though it were a literal truth. At most it means nothing more than that a person or thing has *some* immunity from the local jurisdiction; it does not help us to determine the only important question, namely, how far this immunity extends. We shall here consider certain real and alleged limitations on the territorial jurisdiction of states.

§ 1. *Jurisdiction in Territorial Waters.*

The term 'territorial waters' implies that they are as fully part of the territory of a state as

is its land territory. But it has been suggested that the law recognizes only certain restricted rights of jurisdiction in the coastal state falling short of full sovereignty.

The doctrine which finds most support in the practice of states is that territorial waters form part of the territory of a state as fully as does its land territory, except that there exists a right of 'innocent passage' through them for the ships of other states. Whether warships may pass as of right, or do so only by sufferance, is not quite certain, but in normal times no distinction is made between these and other ships. The right, however, is only one of passage, and therefore, while it applies to territorial straits which connect two open seas, such as the Straits of Messina, it does not apply to those which lead only to the territory of the coastal state, as the Dardanelles did until 1774, when the Black Sea ceased to be Turkish national waters on the acquisition of the Crimea by Russia. Further, the right is one of *innocent* passage, and it is clear that the coastal state must be entitled, if necessary, to exercise *some* jurisdiction over passing ships; it must be allowed, for instance, to enforce regulations dealing with navigation, pilotage, or the like, and to deal with offences which affect its own public order. But whether ships merely in transit through foreign territorial waters are subject to the jurisdiction of the coastal state for all purposes is doubtful. In the case of *R.* v. *Keyn* in 1876 (L. R. 2 Ex. D. 63) the Court of Crown Cases Reserved held, by a majority, that an English Admiralty Court had no jurisdiction to try for manslaughter the com-

mander of a German vessel, the *Franconia*, which had negligently collided with and sunk an English vessel with loss of life about two miles off Dover; there was much discussion in the judgments of the position at international law, but the actual decision turned on the historical question of the limits of English Admiralty jurisdiction. In consequence of this decision there was passed in 1878 the Territorial Waters Jurisdiction Act, which must be taken to express the British view of the extent of the criminal jurisdiction which international law allows states to assume in such a case. The Act gives jurisdiction to British Courts over any offence committed within territorial waters, but it provides that a foreigner is to be prosecuted only by leave of a Secretary of State. This extreme view has been criticized in other countries; and certainly if the jurisdiction were habitually exercised, which in practice it is not, it would cause intolerable inconvenience to foreign ships in transit.

An incident involving civil jurisdiction arose in 1930 when a British vessel, the *Chief Capilano*, was arrested while in transit through American waters in respect of a claim which an American Corporation had against her owners.[1] The American Court released the vessel as having been unlawfully seized. The most reasonable rules on this matter (though they cannot be regarded as settled law) are perhaps those which have been suggested by the 'Harvard Research in

[1] See *B.Y.I.L.*, 1932, p. 125. The American-Panamanian Claims Commission has decided an apparently somewhat similar case, the *David*, in a contrary sense. See *A.J.*, 1933, p. 747.

International Law' in a draft convention prepared in anticipation of the Codification Conference of 1930:[1]

'A state may not exercise jurisdiction in respect of an act committed in violation of its criminal law on board a vessel of another state in the course of innocent passage through its marginal seas, unless the act has consequences outside the vessel and tends to disturb the peace, order or tranquillity of the state.

'A state may not exercise civil jurisdiction over a vessel of another state which is in course of innocent passage through the marginal sea, except in respect of an act committed by the vessel during the course of that innocent passage and not relating solely to the internal economy of the vessel.

'A state may exercise jurisdiction over a vessel of another state which is in its territorial waters for purposes other than innocent passage through its marginal sea to the same extent as over a vessel in port.'

§ 2. *Jurisdiction in Ports.*

Whatever doubts may exist as to the status of territorial waters, there is no doubt that the waters of a port are inland waters, as fully a part of a state's territory as the land. None the less ships, whose business it is to come and go without vexatious delays in foreign ports, have been subjected to a special régime there, by common usage, if not by law.

A distinction which is, of course, not limited to ports, is made between public and private ships. Public ships, at any rate if not engaged in commerce, are wholly exempt from the local jurisdiction; they

[1] See *A.J.* 1929, Special Supplement.

may not be entered by the port authorities for any purpose whatsoever. But this does not mean that a public ship is under no duty to obey the law of the port, as is implied if she is described as 'exterritorial'; on the contrary, she is bound to do so in any matter which has effects external to the ship herself. Thus, while she will observe her own law in a matter of ship's discipline, she must observe any quarantine regulations of the port; she must not give asylum to fugitive criminals, though it has been suggested, on grounds rather of humanity than of law, that she may receive political fugitives; if members of the crew break the law on shore they are not protected from the consequences, though the port authorities may, and often do, hand them over to the ship's authorities instead of dealing with the offence. The immunity of a public ship therefore means, not her total exemption from the local law, but rather that if she violates that law the only proper method of redress is through diplomatic action, and not by judicial process or police action against the ship.

British practice makes no distinction between public ships engaged in commerce and others. In the *Parlement Belge* (1880) 5 P.D. 197, a Belgian mail ship had collided with an English ship in Dover Harbour, but although it was proved that the ship, the property of the King of the Belgians, was partly used by him for trading purposes, the Court held that it could not deal with the claim of the English owners. The American Supreme Court has given a decision in the same sense.[1]

[1] S.S. *Pesaro* (1926) 271 U.S. 562.

But not all states extend the immunity to public ships engaged in ordinary commercial undertakings, and in recent years national trading has become so common, that their exemption from the jurisdiction of national courts sometimes works gross injustice.[1] The abuse was dealt with at a conference held in Brussels in 1926, at which seventeen states signed a convention, of which the main provisions are: that vessels owned or operated by states, and their cargoes and passengers, are to be subject to the same liability in respect of claims as those privately owned; but ships of war and non-trading vessels may not be arrested or detained in a foreign port, and proceedings must be taken against them in the courts of the country to which they belong. The convention is not to apply in time of war. It has not been and apparently is not likely to be ratified.

A private ship in a foreign port is fully subject to the local jurisdiction in civil matters, but there are two views of its position in criminal matters. That followed by Great Britain asserts the complete subjection of the ship to the local jurisdiction, and regards any derogation from it as a matter of comity in the discretion of the territorial state. But though we regard the local jurisdiction as complete, we do not regard it as exclusive; we exercise a concurrent jurisdiction over British ships in foreign ports, and are ready to concede it over foreign ships in British ports.

The other doctrine is founded on an Opinion of the

[1] See, e.g., the *Porto Alexandre* [1920] P. 30.

French Council of State in 1806, referring to two American ships in French ports, the *Sally* and the *Newton*, on each of which one member of the crew had assaulted another. Both the American consuls and the French local authorities claimed jurisdiction, and the Council held that it belonged to the consuls, on the ground that the offences did not disturb the peace of the port. The Opinion declared in effect that the ships were subjected to French jurisdiction in matters touching the interests of the state, in matters of police, and for offences committed, even on board, by members of the crew against strangers; but that in matters of internal discipline, including offences by one member of the crew against another, the local authorities ought not to interfere, unless either their assistance was invoked or the peace of the port compromised. This opinion effected an alteration in French practice, which had previously agreed with that still upheld by Great Britain, and although it has been followed in many continental countries it cannot be regarded as an authoritative declaration of the international law on the matter. It is, moreover, full of ambiguities. If we are asked, for example, what matters 'touch the interests of a state', we should be inclined to answer that the whole administration of the criminal law does so very closely. Further, the Opinion says nothing of the position of passengers; it does not indicate the sort of incidents which ought to be regarded as 'compromising the peace of the port', nor by whom the point is to be decided; it does not say by whom (e.g. by a consul, by the master, by the accused, or by his

victim) the assistance of the port authorities must be invoked in order to justify their interference; it does not even say whether this interference may take the form of assuming jurisdiction. The French courts indeed held, in 1859, when a ship's officer on board an American ship, the *Tempest*, had killed a seaman on the same ship, that some crimes are so serious that without regard to their further consequences, if any, their mere commission compromises the peace of the port, and therefore brings them under the local jurisdiction. Such a decision is sound sense, but difficult to support as an application of the Opinion of the Council of State; and, as M. Fauchille has pointed out, it leads to the result that everything but disciplinary and minor offences among the crew will fall under the local jurisdiction.[1]

This difference of view is perhaps, however, less than it appears. According to a recent French writer on the subject, M. Gidel,[2] the French system does not deny the complete jurisdiction of the state of the port over offences committed on board foreign ships; it merely declares that this jurisdiction will not be exercised in certain cases which it indicates. The English system likewise does not involve the invariable exercise of jurisdiction, but it does not declare in advance in what cases the jurisdiction will or will not be exercised. He holds therefore that the state of the port is as a matter of law within its rights in dealing with any offence against its own laws (a term which would

[1] *Traité*, vol. i, part ii, p. 1034.

[2] *Droit international public de la mer*, tom. ii, pp. 204 and 246.

exclude most purely disciplinary infractions) committed on board a foreign ship; that in practice this absolute territorial competence is not exercised, for reasons of general policy and expediency; and that certain states like France have, and others like Great Britain have not, announced in advance the line they will take in these matters.

The difference above referred to relates only to the question of jurisdiction over offences committed by members of the crew on board a merchant vessel. There is almost universal agreement that a merchant vessel may not afford asylum to a fugitive from justice, and such a fugitive may, if necessary, be removed from the ship, though as a matter of courtesy it is usual to inform the consul of the state concerned of the intended arrest.

A ship may have occasion to put into a foreign port when she has on board persons in custody which is legal by the law of her state. Can such persons claim their liberty on the ground that they have committed no offence against the law of the state into whose port they have been brought?

A French ship, the *El Kantara*, put into the port of Newcastle, N.S.W., in 1922, having on board two prisoners *en route* to a French penal settlement. The prisoners escaped; the ship left without them; and they were later arrested and handed over to another French ship. Just before this latter ship sailed, an application for a *habeas corpus* rule was made to the Australian Court, but refused on the ground that there was no *prima facie* evidence to suggest that their

custody was not legal by French law.[1] The decision implies that the courts of the port state may inquire into the regularity of the custody of a person on board a foreign ship, and, if necessary, release him; but that they will not interfere with a custody which appears to be regular by the law of the ship. Any other conclusion would be highly inconvenient.

§ 3. *Jurisdiction over the Air.*

Two modern inventions, flying and wireless telegraphy, have made the international legal status of the air a matter of interest. Many different views have been put forward. At a Conference held in Paris in 1910, Great Britain contended for the view that a state is sovereign over the air above its territory, and France for that of the freedom of the air, and the Conference failed to reconcile these views. A theoretical objection to admitting the territoriality of the air is that it is physically impossible for the state to appropriate it or even to exercise regular control over it except near the ground; and a practical objection is that it implies the right of a state to close its air, if it chooses, to the nationals of other states. On the other hand, the law of gravity compels us to rule out any analogy with the sea, and makes it impossible to admit the complete freedom of the air. There are two competing interests which the law ought to reconcile as far as possible: that of the subjacent state in its

[1] Cf. Charteris, in *Journal of Comparative Legislation*, 1926, p. 246, and on the subject of this section generally cf. the same writer in *B.Y.I.L.*, 1920–1, p. 45.

security, and that of all states in the greatest possible freedom of communications. It seems clear, however, that the theory of complete sovereignty has now prevailed and that other states only have such rights as are secured to them by treaty. A large number of states have enacted domestic legislation dealing with the air, in which this is either expressly claimed or impliedly assumed, and any remaining uncertainty was removed by a Convention on Air Navigation which was signed at Paris in 1919 by a large number of states. In Great Britain the Air Navigation Act, 1920, gave effect to this Convention. It recognizes expressly the complete sovereignty of states over the air above their territory, including that above their territorial waters, but they undertake to allow passage to the private aircraft of the other contracting states without distinction of nationality subject to conditions established by the Convention. Prohibited zones may be established in the interests of public security, provided the prohibition is also applied to domestic aircraft; routes and landing-places may be prescribed; and the transport of persons or goods between two points in a state's territory may be reserved to domestic aircraft. This last provision extends to the air the practice which is known in sea navigation as *cabotage*. Military aircraft may fly over foreign territory only by special permission. The Convention also contains comprehensive regulations dealing with registration of aircraft, certificates of airworthiness, and other technical matters, and it sets up an International Commission of Air Navigation, acting under the League of

Nations, which acts as a clearing-house for information on air navigation questions, decides differences of a technical character, and even has power, by a three-quarters vote of all the members, to amend some of the technical provisions of the Convention.

The international aspects of wireless telegraphy were dealt with in conferences held in Berlin in 1906 and in London in 1912; they are now regulated by a convention made at Washington in 1927.

§ 4. *Jurisdiction over Waterways.*

When the whole course of a river and both its banks are within the territory of a single state, that state's control over the river is as great as over any other part of its territory, unless its rights have been limited by treaty. The only rivers, therefore, which concern international law are those which flow either through, or between, more states than one. Such rivers are conveniently called 'international rivers'; and they raise the question whether each of the riparian states has in law full control of its own part of the river, or whether it is limited by the fact that the river is useful or even necessary to other states. An obviously important interest at stake is that of navigation; it may be of vital concern to an up-river state that states nearer the mouth should not cut off its access to the sea; and it may be of considerable importance even to non-riparian states to have access to the upper waters of the river. In recent years, too, the economic uses of rivers, for such purposes as irrigation, the supply of water to large cities, and the generation of hydro-

electric power, have become increasingly more important.[1] It is obviously desirable that all these interests should, so far as possible, be effectively protected; but the question is whether they are protected by any rule of customary international law with a general application to all international rivers, or whether they can only be secured by particular conventions between the powers concerned.

Grotius held that the navigation of rivers ought to be free; but he founded this view on the notion that private property had originated in an agreement among all men to abandon a pre-existing system of communism, and that they had reserved certain rights in common over the things that became henceforward private property. One of these rights was the right of 'innocent use'; and he argued that as the use of a river for navigation is 'innocent', that is to say, it does not reduce the value of the river to its owner, therefore it must be free (*De jure belli*, Book II, ch. ii, p. 13). This argument has left its mark on international controversies in comparatively modern times. For example, the United States in 1823 argued that British jurisdiction over the St. Lawrence originated in a 'social compact', but that the right of navigating the river was a 'right of nature, preceding it in point of time', and ought therefore to be open to American ships. Great Britain replied that this was a 'novel and extraordinary' claim, but offered to open the river as a 'concession' and as part of a general settlement of differences.[2] The un-

[1] Cf. Smith, *Economic Uses of International Rivers*.

[2] Cf. Moore, *Digest of International Law*, vol. i, p. 632.

historical basis of this doctrine has been discarded, but in substance it is still held by many modern authorities. It is, however, difficult to accept it. In the first place, such a right of passage can hardly be an unconditional right; at the least it must be subject to reasonable conditions about complying with navigation regulations, and contributing to the upkeep of the river, the use of ports, buoys, and the like. But in that case the right can only be an 'imperfect' one, or a right which can only be made effective by a convention regulating the conditions of its exercise; and if a convention is necessary in any case, is it not simpler to say that while there may sometimes be a strong moral claim to have a river opened to navigation, no legal right exists except by convention? In the second place, the history of state practice in the matter lends little support to the theory of a general rule of freedom of navigation on international rivers; and the large measure of freedom which now exists is the creation of treaties.

From early in the seventeenth century treaties between particular states opening particular rivers began to be common; but it was not until the Treaty of Paris in 1814 that a general declaration of freedom of navigation on all international rivers was proclaimed. But that treaty left it to the Congress of Vienna in 1815 to work out the new principle in detail; and unfortunately there were two currents of opinion at the Congress, and the articles dealing with rivers were deliberately so worded as to make it uncertain whether the rights of navigation were intended to be limited to riparian, or extended to all, states. It

was left to the former states to give effect to the principle of free navigation, and they naturally adopted the narrower construction, for example, in the Convention of Mainz, 1831, relating to the Rhine. During the next forty years many rivers were freely opened to riparian states, but there was a strong tendency to exclude non-riparian states. The Treaty of Paris, 1856, however, marked a return to the wider principle. It set up a body called the European Danube Commission, consisting of representatives both of riparian and non-riparian states, to improve the conditions of navigation on the lower Danube. The Commission was intended to be temporary, and its powers were to revert to another Commission to consist only of riparian representatives; but its duration has been extended and its powers enlarged by successive treaties. When it was instituted, navigation on the Danube was chaotic; the stream was obstructed by shoals, piracy and wrecking were common, extortionate dues were charged. The Commission altered all this, and proved a most successful experiment in international co-operation, though in recent years its position has been rendered difficult by financial stringency and by the attitude of some of the riparian states, which are inclined to resent the extent of its authority. It has wide administrative powers to the exclusion of the sovereignty of the territorial states through which the river flows. It controls and polices navigation, fixes dues, constructs works, and even tries offences against its regulations. Since 1921 there are two Commissions: the European Commission regulating the

Danube from Braila to the Black Sea and consisting of representatives of Great Britain, France, Italy, and Rumania only; and the International Commission for the upper parts of the river which includes representatives of many other states.

Since the Treaty of Paris, 1856, the principle of free navigation for all states has made further progress. It was extended to the Rhine, with some qualifications in favour of the riparian powers, by the Convention of Mannheim, 1868; and the African Conference of Berlin in 1885 applied it to the Congo and the Niger.

The Peace Treaties of 1919 dealt with the most important rivers flowing through the ex-enemy countries, creating international commissions for some of them, and establishing on all of them equal treatment for all states. The work has been carried on by the League of Nations at the Barcelona Transit Conference in 1921. The two most important of the Barcelona Conventions are: (1) A Statute on 'navigable waterways of international concern', laying down general principles, which are intended to be applied in detail to all international rivers by separate conventions, providing for free navigation for all the contracting states, imposing the duty of maintaining the river on the riparian states, and limiting the charges that may be levied to the expenses of maintenance; a voluntary protocol is annexed, by which states may reciprocally agree to open their own national rivers or canals to other states. (2) A Statute on 'freedom of transit', applying to transit of persons or goods through a state either by water or rail. Such transit is to be

facilitated without distinction of nationality, and without charging dues except for certain administrative expenses.

Most river commissions, however, do not follow the Danube model; their powers are narrower. The typical functions of such a commission may be thus stated:[1] it supervises the application of the régime established for the river; it serves as a sort of standing conference of the parties; it takes certain decisions, within the ambit of its powers, relating to works, dues and technical services, such decisions binding the states affected, but being matters for the states, and not for the commission itself, to execute; it sometimes acts as a court of appeal in cases of alleged breaches of the convention; it serves as an organ of liaison for the exchange of information, co-ordination of statistics, and the like; and it is an organ of conciliation, and sometimes of arbitration, in differences between the states.

Navigation, however, is only one of the uses to which the waters of a river may be put, and not always, as for instance in the case of the Nile, the most important. The law relating to the other uses of rivers, and indeed the customary law relating to rivers generally, is still in an early stage of development, for the problems, or at any rate many of their important factors, are of recent growth. Professor H. A. Smith, in the book already referred to, has called attention to certain considerations which the student of this branch of the law should bear in mind. He points out the

[1] Cf. Hostie, in *Recueil des cours de l'Académie de droit international*, vol. xl, p. 438.

danger of trying to deduce the actual law from some assumed general principle, such as the absolute rights of the territorial sovereign, or a natural right of free navigation, or the priority of the interests of navigation over other interests.

'A great river system is an extremely complex thing, in which many states, riparian and non-riparian, may have many and varied interests. These interests may be political, strategic, or economic, and it is obvious that in many cases they may conflict. The function of law is to provide rules for regulating the possible conflict of interests, and in practice it always achieves this end by trying to strike an equitable balance between them.'

It cannot be said that international law has as yet discharged this function, but it has perhaps made a beginning. The practice of states, as evidenced in the controversies which have arisen about this matter, seems now to admit that each state concerned has a right to have a river system considered as a whole, and to have its own interests weighed in the balance against those of other states; and that no one state may claim to use the waters in such a way as to cause material injury to the interests of another, or to oppose their use by another state unless this causes material injury to itself. This principle of the 'equitable apportionment' of all the benefits of the river system between all the states concerned is clearly not a single problem which can be solved by the formulation of rules applicable to rivers in general; each river has its own problems and needs a system of rules and administration adapted to meet them. The way of

advance seems therefore to lie, as Professor Smith suggests, in the constitution of authorities to administer the benefits of particular river systems. One such authority, the International Joint Commission, was created for the 'boundary waters' between the United States and Canada by a treaty of 1909. It consists of three commissioners from each side, and it has jurisdiction to decide applications for 'the use or obstruction or diversion' of the boundary waters as defined in the treaty. Other questions may be submitted to it by either government for examination and an advisory report, and under this head it has reported on the vast project for a deep waterway via the St. Lawrence to the Middle West of America. The work of the Commission has been efficiently and smoothly performed.

In the absence of treaty stipulations a canal is subject to the sole control of the state in whose territory it lies, and there is no right of passage through it for the ships of other states. But three interoceanic canals, Suez, Panama, and Kiel, have received a special status. They are commonly but inaccurately said to be 'neutralized', or 'internationalized'.

The Suez Canal lies in Egyptian territory; it is owned by a French company in which the British Government is the largest shareholder. It was opened in 1869 under a concession which is to run for ninety-nine years and then revert to the Egyptian Government. The present status of the canal rests on the Convention of Constantinople, 1888, to which all the great European powers and some others are parties;

but the duration of the Convention is not limited to that of the company's concession.

The canal is to be open in war and in peace to every vessel of commerce and war, without distinction of flag. It is never to be blockaded (Art. 1); no act of war is to be committed in the canal or within three miles of its ports of access (Art. 4); belligerent warships must pass through with the least possible delay and may not stay more than 24 hours at Port Said or Suez; and an interval of 24 hours must elapse between the sailing of two hostile ships from these ports. The defence of the canal was committed to Turkey and Egypt (Art. 9), but this provision broke down when Turkey herself attacked the canal in 1914, and under the Peace Treaties Great Britain was substituted for Turkey.

The position of the British forces in Egypt and the future defence of the canal remain to be settled by negotiations between Great Britain and Egypt under the proclamation of Egyptian Independence of 1922 (see *ante*, p. 97).

The Panama Canal runs through a zone of Panamanian territory which is occupied and administered by the United States. It is regulated by no general international convention, but the United States, which constructed and maintains it, is under the obligations of two treaties with regard to it, the Hay-Pauncefote Treaty of 1901 with Great Britain, and the Hay-Varilla Treaty of 1903 with Panama.

By the Hay-Pauncefote Treaty she bound herself to accept certain rules, taken in the main from the

Suez Canal Convention, as the basis of the so-called 'neutralization' of the Canal. Article 3 provided that:

> 'The canal shall be free and open to the vessels of commerce and war of all nations . . . on terms of entire equality so that there shall be no discrimination against any such nation or its citizens or subjects in respect of conditions or charges of traffic or otherwise. Such conditions or charges of traffic shall be just and equitable.'

Provisions that the canal is never to be blockaded, that no act of war is to be committed within it, though the United States may maintain military police for its protection, as to the transit of belligerent ships, and other matters follow practically the terms of the Suez Convention.

In 1912 Congress passed an Act which authorized the President to fix tolls, but so that no tolls were to be levied on vessels engaged in the coastwise trade of the United States, and other American vessels might be exempted if the President thought fit. Great Britain protested that when Article 3 of the Hay-Pauncefote Treaty spoke of equality for 'all nations', it did not mean 'all nations except the United States', and when President Wilson took office he declared the exemption of coastwise shipping to be 'in plain contravention of the Treaty' and at his request Congress repealed it.

The Kiel Canal is, by the Treaty of Versailles, to be 'free and open to the vessels of commerce and war of all nations at peace with Germany on terms of entire equality'. Germany is bound to maintain it

in navigable condition, and only to levy such charges as are necessary for this purpose. Disputes arising under these provisions are to be determined by the Permanent Court.

These provisions came before the Court in the case of the S.S. *Wimbledon*,[1] the first occasion on which any state had been sued in an international court of justice without having specially consented to the suit. The *Wimbledon* was an English vessel chartered by a French Company, and carrying munitions consigned to Poland during the Russo-Polish war of 1921. She was not allowed to pass through the canal, on the ground that the German neutrality regulations forbade the export or the transit of munitions to either belligerent. The majority of the Court held, however, that the meaning of the Treaty was clear and that it must prevail over Germany's own neutrality regulations; and they went on to lay down the principle, of great interest for the status of canals in general, that 'when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign state under whose jurisdiction the waters in question lie'. For this proposition the Court relied on the precedents of Suez and Panama; Turkey's neutrality had not been regarded as violated by the passage of belligerent men-of-war or ships carrying contraband through the Suez Canal, and the

[1] *Publications of the Court*, Series A, No. 1.

United States had allowed the passage through the Panama Canal of belligerent men-of-war as well as prizes, and placed no restriction on ships carrying contraband, without any allegation that she was thereby compromising her neutrality.

§ 5. *Diplomatic Persons and Heads of Foreign States.*

The early history of the law relating to diplomatic privileges is the subject of a recent valuable study by Professor E. R. Adair.[1] He points out that the status of foreign envoys was formerly a topic of great practical importance, as is shown by the amount of literature and the number of international incidents to which it gave rise. When a foreign envoy was not seldom the centre of a treasonable plot, it was a matter of public importance to know the extent of his immunity from criminal process; and when he might be a man of no substance, perhaps with his salary in arrear, it was even a matter of popular interest to know how far his immunity from civil process would enable him to swindle the people among whom he lived. In these respects at least international manners have improved in modern times, and the law of diplomatic privileges is no longer a branch of the first importance.

In Great Britain the immunities which international law accords to a foreign diplomatic person rest partly on the Common Law and partly on the Diplomatic Privileges Act, 1708. In different countries practice differs in details both as to the extent of the immunities and the persons to whom they apply. A further diffi-

[1] *Exterritoriality of Ambassadors in the sixteenth and seventeenth centuries.*

culty in stating the law arises because it is sometimes uncertain whether a particular immunity which may be usual is allowed as a matter of law or of courtesy.

A diplomatic person is wholly exempt from criminal proceedings and from police action in the country to which he is accredited. This does not mean that it is not his duty to obey the criminal law or police regulations of the country, but rather that if he does not do so the only action that may be taken against him is a diplomatic complaint to his government, or, in an extreme case, his expulsion. No doubt it is possible to imagine cases of serious crimes which could only be met by the application of restraint to his person, but it is unnecessary to discuss whether such cases form a legal exception to his general immunity.

He is similarly exempt from civil proceedings, even from being required to give evidence in a court of law. On one view this immunity is limited to proceedings which might interfere with the conduct of his official duties; it would not extend, for example, to proceedings in respect of a private business in which he might be engaged; but the general modern practice is to treat the immunity as complete, unless he voluntarily submits to the jurisdiction. In Great Britain the terms of the Act of 1708 are vigorous and far-reaching on this point; all writs whereby the person of an ambassador may be arrested or his goods seized are null and void, and any person presuming to sue forth such a writ and all officers executing it 'shall be deemed violators of the laws of nations and

disturbers of the publick repose, and shall suffer such pains penalties and corporal punishment' as the Lord Chancellor and Chief Justices shall judge fit. But if a diplomatic person has submitted to the jurisdiction, there is no doubt that the Courts may assume it, as in *re Suarez*, [1918] 1 Ch. 176, where a claim was made against the ex-minister of Bolivia, and the Court of Appeal, dealing with the argument that a waiver of privilege would be invalid unless the government of the privileged person had consented to it, declared that they must assume that in waiving his privilege such a person was acting in accordance with his instructions. But even voluntary submission to the jurisdiction will not enable the orders of the court to be enforced against the diplomatic person by the ordinary forms of process.

That the essence of the diplomatic privilege is immunity from *enforcement* of the local law so long as the privilege lasts and not immunity from the application of the law is well illustrated in a recent English case.[1] The plaintiff had been injured by the car of the defendant, who was a secretary in the Peruvian Legation. The defendant did not plead his diplomatic immunity, but served a third party notice on his insurance company, demanding that they should indemnify him against the claim. The company having repudiated liability on the ground that the defendant himself was under no legal liability to the plaintiff, the Court held that diplomatic agents are not immune from legal liability, but merely not liable to be sued

[1] *Dickinson* v. *Del Solar*, [1930] 1 K.B. 376.

unless they submit to the jurisdiction. Judgment against the defendant therefore created a legal liability against which the company had agreed to indemnify him.

A diplomatic person has a certain immunity from taxation, but the extent of this varies under different systems of taxation. For instance, in Great Britain the tax deducted at the source on a British investment would not be repaid to him. On the other hand, a diplomatic salary should certainly not be taxed, and customs duties are not usually charged on articles imported for his personal use. In any case, the payment of a tax by a diplomatic person could never be enforced.

The residence of a diplomatic person is in ordinary circumstances inviolable. If it should be necessary to arrest in a legation some person not himself immune from arrest, the proper course is to ask the minister to surrender him or to consent to the arrest; and it is the minister's duty to accede to such a request, since he may not turn his residence into an asylum for fugitives from the local justice. Still less may he himself assume powers of jurisdiction within the legation; thus in 1896 when Sun Yat Sen, a political refugee from China, had been induced to enter the Chinese Legation in London and was detained there in order to be sent to China, the British Government refused to accept the minister's contention that the Legation was Chinese territory, and peremptorily demanded his release, which was granted.

The immunities of a diplomatic agent extend to his

family and suite, and it is usual to deposit with the foreign office a list of those for whom they are claimed. How far the immunity of mere servants of a diplomatic agent, not being members of his official staff, extends is not quite clear. In England domestic servants are expressly protected from civil proceedings by the Act of 1708, unless they engage in trade, but they are probably not exempt from criminal jurisdiction.

An English court will not receive evidence of the character of a person claiming diplomatic status, but will accept a statement on the matter from the Foreign Office as conclusive.[1]

The immunities of a diplomatic person, whatever they may be, continue after he has ceased to hold his office until he has had a reasonable time in which to leave the country.[2]

The immunities of the head of a foreign state are in general the same as, and certainly not less than, those of a diplomatic person. In England the courts accept a statement by a Secretary of State that the King recognizes the person before the court as a 'sovereign' as conclusive of his status, and they do not inquire whether he is entitled to be regarded as a sovereign in international law. Thus the ruling princes of India receive the privileges of sovereigns in our courts, and in *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149, the Court refused to entertain an action for breach of promise of marriage against one of these potentates, even though he had posed to the plaintiff as a private

[1] *Engelke* v. *Musmann*, [1928] A.C. 433.

[2] *Musurus Bey* v. *Gadban*, [1894] 2 Q.B. 352.

individual. The recent prolonged litigation in the case of the *Duff Development Company* v. *Kelantan Government* is important on the question of the effect of the submission to the jurisdiction of a sovereign, and though the court declined to say that the submission of a diplomatic person would have the same effect there seems no reason for making a distinction on this point. Kelantan is a protected Malay State, having no relations with foreign powers except through Great Britain, and in internal administrative matters bound to accept the advice of a British resident. None the less in answer to the court's request for information, the Secretary of State for the Colonies described it as an independent state in which Great Britain neither exercised nor claimed any rights of sovereignty or jurisdiction. The House of Lords held that this statement was conclusive of Kelantan's sovereign status in an English court, although it is difficult to see what meaning can be conveyed by such words as independence, sovereignty, or jurisdiction, in the circumstances. The litigation arose out of an agreement between the company and the Kelantan government, even this having been made on its behalf by the Crown Agents for the Colonies in London. Disputes having arisen and been submitted by agreement to arbitration, and an award having been given for the Company which directed the Government to pay costs, the Government applied to the courts to set aside the award for error in law, and this application was dismissed with costs in all the courts up to the House of Lords ([1923] A.C. 395). Meantime the Company obtained a garnishee order attaching

certain moneys of the Government in the hands of the Crown Agents for the recovery of their costs, and the Government applied to set aside this order on the ground that Kelantan was an independent sovereign state. This application also was carried to the House of Lords, which accepted the sovereign status of Kelantan, and further held that for the submission of a sovereign to the jurisdiction to take effect as a waiver of immunity it must be made at the moment when the jurisdiction is invoked; neither the original submission to the arbitration proceedings nor the subsequent application to set aside the award was material, and the award therefore could not be enforced ([1924] A.C. 797).

The facts in the Kelantan case are startling, showing, as they do, the risk of serious injustice to private litigants which is involved in the view that English courts take of the extent of the immunity. But the fault in that case did not lie with the courts, and it is probable that the rule of complete immunity is a more workable rule than any other. Some states, e.g. Belgium, draw a distinction between acts done in a sovereign and those done in a non-sovereign capacity, but this distinction is necessarily to some extent arbitrary and uncertain.[1] Others, e.g. Italy, are apparently ready to infer a voluntary submission to the jurisdiction from equivocal acts such as the making of contracts within the jurisdiction, but there are dangers in acting on a merely 'constructive' submission. The

[1] Cf. Fitzmaurice, 'State Immunity from Proceedings in Foreign Courts', *B.Y.I.L.*, 1933, p. 101.

real justification for the rule of the complete immunity of states from the jurisdiction of a foreign court, except in the event of a submission which is not only *real*, but is also a submission in respect of the proceedings actually before the court, is that, generally speaking, the courts of one state cannot coerce another, nor, for reasons of public policy, is it desirable that they should try.

Consuls are not diplomatic agents; they perform various services for a state or its subjects in another state, without however representing the former in the full sense. They may be nationals of either state, and generally they are made subject to the authority of the diplomatic representative of the state for which they act. They watch over commercial interests of the state for which they act; collect information for it; help its nationals with advice, administer their property if they die abroad, and register their births, deaths, and marriages; they authenticate documents for legal purposes, take depositions from witnesses, and the like. They also have important functions concerned with shipping, sending home, for instance, shipwrecked or destitute persons, and settling disputes between master and crew. Their immunities are indefinite, and exist by courtesy or by special conventions between particular states rather than by rules of law. They are generally exempted from direct taxation and from service on juries; but they are not immune from civil or criminal proceedings, though there is a general sentiment that, if possible, these should not be allowed to interfere with their official

duties, or with the inviolability of the archives of the consulate. In certain non-Christian states, consuls exercise both civil and criminal jurisdiction over their own countrymen and enjoy the privileges of diplomatic persons under the treaties known as 'Capitulations'. The powers of British consuls in this respect are regulated by the Foreign Jurisdiction Act, 1890.

§ 6. *Jurisdiction over Aliens.*

No state is legally bound to admit aliens into its territory, but if it does so it must observe a certain standard of decent treatment towards them, and their own state may demand reparation for an injury caused to them by a failure to observe this standard. Demands of this kind have been one of the most fertile sources of controversy between states, and in the absence of an impartial tribunal the rules of law by which they ought to be determined have been obscured, both by the tendency of the stronger powers to press the claims of their nationals without much regard to legal justification, and by that of the weaker powers to try to avoid responsibilities for corrupt or incompetent administration by exaggerated emphasis on the rights supposed to be inherent in their independent status. Fortunately such controversies are particularly suitable for judicial settlement, and in recent years arbitral decisions have built up a store of valuable precedents which are gradually clarifying the law relating to them.

In general a person who voluntarily enters the territory of a state not his own must accept the institu-

tions of that state as he finds them. He is not even entitled to demand equality of treatment in all respects with the citizens of the state; for example, he is almost always debarred from the political rights of a citizen; he is commonly not allowed to engage in the coasting trade, or to fish in territorial waters; he is sometimes not allowed to hold land. These and many other discriminations against him are not forbidden by international law. On the other hand, if a state has a low standard of justice towards its own nationals, an alien's position is in a sense a privileged one, for the standard of treatment to which international law entitles him is an objective one, and he need not, even though nationals must, submit to unjust treatment. This statement of the law is denied by certain Latin-American states, which hold that if a state grants equality of treatment to nationals and non-nationals it fulfils its international obligation; but such a view would make each state the judge of the standard required by international law, and would virtually deprive aliens of the protection of their own state altogether. 'Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of the authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.'[1] As Hall[2] points

[1] Opinions of U.S.-Mexican Claims Commission, *Roberts*' case, at p. 105.

[2] *International Law*, 8th ed., pp. 59–60.

out, international law itself is a product of the special civilization of modern Europe, and reflects the essential facts of that civilization so far as they are fit subjects for international rules; and among those facts is the existence in most states of a municipal law, consonant with modern European ideas, and so administered that foreigners may obtain criminal and civil justice from it. A state professing to be subject to international law is bound to furnish itself with such a system. The rule therefore that an alien must accept the institutions of a foreign state is qualified by the requirement that those institutions must conform to the standard set by international law; and if an alien suffers injury in person or property through the failure of a state to conform to that standard, his own state may prefer a claim to reparation on his behalf.

This international standard cannot be made a matter of precise rules. It is the standard of the 'reasonable state', reasonable, that is to say, according to the notions that are accepted in our modern civilization. It was thus described by the American-Mexican Claims Commission:[1]

'the propriety of governmental acts should be put to the test of international standards, and . . . the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds

[1] Opinions of Commissioners, *Neers'* case, at p. 73.

from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.'

The standard therefore is not an exacting one, nor does it require a uniform degree of governmental efficiency irrespective of circumstances; for example, measures of police protection which would be reasonable in a capital city cannot fairly be demanded in a sparsely populated territory, and a security which is normal in times of tranquillity cannot be expected in a time of temporary disorder such as may occasionally occur even in a well-ordered state. But the standard being an international one, a state cannot relieve itself of responsibility by any provision of its own national law. Thus the central government of a federal or other composite state may be *constitutionally* unable to secure that justice is rendered to an alien by the authorities of a member state or of a colony, but if the central government is the only government which has relations with other states its *international* responsibility is not affected by the domestic limitation of its own powers.

It is ordinarily a condition of an international claim for the redress of an injury suffered by an alien that the alien himself should first have exhausted any remedies available to him under the local law. Since no state guarantees that the person or property of an alien will not be injured, the mere fact that such an injury has been suffered does not of itself give his own state a right to demand reparation on his behalf. If

the state in which the injury occurs offers him a proper remedy, it is only reasonable that he should be required to take it. This rule of the exhaustion of local remedies, however, must be reasonably interpreted.[1] For example in the case of *Robert E. Brown* already referred to,[2] the Court, referring to the argument that the claimant had not exhausted all the judicial remedies open to him, quoted with approval the statement of Secretary of State Fish in 1873 that 'a claimant in a foreign state is not required to exhaust justice in such state when there is no justice to exhaust'. Apart from extreme cases like this there are certain wrongs for which it is not unusual to find that the local law provides no remedy, for example the wrong may have been committed by the legislature itself, or by some high official whose acts are not subject to review. Again, the rule is not a mechanical formula, and it probably does not require proceedings to be taken in the local courts when it is morally, even though not formally, certain, that they will lead to no redress, for example it may be clear that the local courts are bound by their own precedents to deny the claim. The justification of the rule is obvious; it is right that a state should have a full and proper opportunity of doing justice itself before justice is demanded of it by another state. But in practice the rule is often excluded in agreements for the submission of claims to arbitration, possibly, as Professor Borchard suggests, because states are reluctant to raise the delicate

[1] Cf. Borchard in *A.J.* 1934, p. 729.
[2] *Supra*, p. 118.

questions involved in an allegation that justice has been 'denied' by the defendant state, as they would often be driven to do if as a preliminary condition of the claim they must show that justice has been sought.

Another condition is that the injury in respect of which a claim is preferred must have been suffered by a national of the claimant state,[1] and if, as often happens, the beneficial interest in the claim has passed from the person originally injured to some one else, it is probably also necessary that it should have been continuously vested in some national of the claimant state from the date of the injury down to the date of the award.

A state may incur responsibility by the act or omission of any of its organs, legislative, executive, or judicial, but these cases require separate consideration. As an example of legislative action towards an alien in violation of international law may be cited the Costa Rican law, already referred to,[2] nullifying contracts made by the *de facto* government of Tinoco. In recent years difficult questions have been raised by legislation in certain states expropriating private property without compensation. There is no doubt that such a measure directed against the property of aliens as such would violate international law, but if it is applied for some public purpose without discriminating either avowedly or in fact between nationals and aliens the matter is less clear.[3] The precedents are

[1] See Hurst, 'Nationality of Claims', in *B.Y.* 1926.

[2] *Supra*, p. 108.

[3] In two articles on 'International Law and the Property of Aliens' in

indecisive; but it is submitted that Sir John Fischer Williams is right in concluding that there is not, nor is it desirable that there should be, any absolute rule forbidding the taking of an alien's property by a state without compensation. The sanctity of private property may be in general a sound maxim of legislative policy, but it is difficult in these days to hold that it may in no circumstances be required to yield to some higher public interest. 'Whatever may be our views as to the relative merits of socialist and individualist doctrines, it is impossible to assert that modern civilization requires all states to accept unreservedly the theories of one side in the great economic conflict.'

In certain circumstances the wrongful act of an official may involve his state in responsibility to the state of an injured alien. In the first place the official must have acted within the scope of his office; otherwise his act would be like that of a private individual. Secondly, a state has a higher responsibility for the acts of superior officials than for those of subordinates. For the former it is responsible, provided only that the local remedies, if any, have been exhausted without redress being secured. Thus in *The Sidra*[1] the Anglo-American Claims Tribunal awarded damages to Great Britain in respect of injury to a British merchant vessel to which the negligent navigation of an American government vessel in Baltimore harbour had con-

B.Y. 1928 and 1929 Sir John Fischer Williams and Mr. A. P. Fachiri reach opposite conclusions on this matter.

[1] Nielsen's Report, p. 452.

tributed; and in the *Zafiro*[1] the same tribunal awarded compensation for British property looted by the Chinese crew of an American supply ship at Manila, on the ground that in the circumstances the American officers were at fault in letting the crew get out of hand; there would have been no liability for the action of the crew as such. For the actions of subordinate employees of the state, such as unofficered soldiers, members of a crew, policemen, and the like, some further act or omission is necessary to fix the state with responsibility, that is to say, something more than a mere failure to redress the wrong. There must be either a 'denial of justice' in the sense defined below, or something which indicates the complicity of the state in, or its condonation of, the original wrongful act, such as an omission to take disciplinary action against the wrongdoer.

The term 'denial of justice'[2] is sometimes loosely used to denote *any* international delinquency towards an alien for which a state is liable to make reparation. In this sense it is an unnecessary and confusing term. Its more proper sense is an injury involving the responsibility of the state committed by a court of justice, and on the question what acts of this kind do involve the state in responsibility there are two views. Most Latin-American states insist on a very narrow interpretation, and contend in effect that if the courts give a decision of any kind there can be no denial of justice

[1] Nielsen's Report, p. 578.

[2] See Fitzmaurice, 'Meaning of the Term Denial of Justice', *B.Y.*, 1932, p. 93.

and consequently no responsibility of the state for their conduct. Nothing but the denial to foreigners of access to the courts can be properly regarded as a denial of justice. This view, which involves the virtual rejection of the principle of an international standard applicable to the action of courts of law towards foreigners, cannot be accepted. There are many possible ways in which a court may fall below the standard fairly to be demanded of a civilized state without literally closing its doors. Such acts cannot be exhaustively enumerated, but corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it, are instances. Possibly it is convenient also to include in the term certain acts or omissions of organs of government other than courts, but closely connected with the administration of justice, such as execution without trial, failure to bring a wrongdoer to trial, long imprisonment before trial, grossly inadequate punishment, or failure to enforce a judgment duly given. But no merely erroneous or even unjust judgment of a court will constitute a denial of justice, except in one case, namely, where a court, having occasion to apply some rule of international law, gives an incorrect interpretation of that law, or where it applies, as it may be bound by its municipal law to do, a rule of municipal law which is itself contrary to international law.

It will be observed that even on the wider interpretation of the term 'denial of justice' which is here

adopted, the misconduct must be extremely gross. The justification of this strictness is that the independence of the courts is an accepted canon of decent government, and the law therefore does not lightly hold a state responsible for their faults. It follows that an allegation of a denial of justice is a serious step which states, as mentioned above, are reluctant to take when a claim can be based on other grounds.

The desire of certain states to limit their international responsibility in the matter of the treatment of foreigners as strictly as possible has already been referred to; it appears clearly in the decisive importance which they try to attach to the absence of discrimination between foreigners and nationals, and in the narrow sense which they give to a denial of justice. But besides contending for a restricted interpretation of their legal obligations, some states have attempted to exclude their responsibility altogether by a term in the contract which they make with the alien whereby the latter purports to waive the protection of his own state. Such a term is known as a 'Calvo Clause'. It takes different forms, but the following is a typical illustration:

'The contractor and (his employees) shall be considered as Mexicans in all matters within the Republic of Mexico concerning . . . the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans. . . . They are consequently deprived of any rights as

aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted.'[1]

The validity of a Calvo clause has often been considered by international tribunals and their decisions are not uniform. The objection to it is that the individual who enters into the contract cannot waive a right which belongs not to himself but to his government; and if the clause is so framed as to make him purport to do this, to that extent at any rate it should be held to be a nullity. 'Such government', as the Commission said in the case from which the clause above is taken, 'frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen cannot by contract tie in this respect the hands of his government.'

It is apparent from the preceding discussion that a state incurs no responsibility for an injury suffered by an alien unless some fault either of commission or omission can be attributed to itself. It follows that it is not responsible for an injury which results from the act of a private individual. Such an act, however, may be an occasion out of which state responsibility may indirectly arise, but only if it is accompanied by circumstances which can be regarded as in some way, by complicity before or condonation after the event, making the state itself a party to the injurious act of the individual. It is therefore necessary in such a case to ask firstly, whether the state ought to have prevented

[1] *North American Dredging Co. of Texas* v. *Mexico*. Opinions of U.S.-Mexican Claims Commission, p. 21.

the injurious act, and secondly, whether it has taken the remedial steps which the law requires of it. Thus where the injury in question would not have occurred if the state through its officers had been reasonably diligent, responsibility will be incurred. The standard of diligence naturally varies with circumstances. For example the fact that the individual was one of a mob of rioters or of a body of insurgents might, according to circumstances, indicate either that special precautions ought to have been taken, or that the authorities were faced with a situation so difficult that they could not reasonably be expected to do more than they did.[1]

The application of this principle to *political* crimes was authoritatively defined by a Committee of Jurists appointed by the Council of the League after the murder of the Italian General Tellini on Greek territory in 1923, in the following terms:

'The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest, and bringing to justice of the criminal. The recognized public character of a foreigner and the circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance on his behalf.'

If there has been no failure of diligence on the part of the state in its preventive measures, it may still incur

[1] Compare the case *Youmans* v. *Mexico*, U.S.-Mexican Claims Commission Reports, p. 150, with that of the *Home Missionary Society*, before the Anglo-American Claims Tribunal, Nielsen's Report, p. 421.

responsibility through the injurious act of a private individual, but only in the event of a denial of justice in the sense already discussed. A state is not required to *guarantee* the effectiveness of its remedial machinery, and therefore the mere failure of the injured person to secure adequate redress through the courts, that failure being due to something less than a denial of justice, is not enough to fix the state with liability.

It has been stated that the theory underlying the law of state responsibility for injuries to foreigners is that the claimant state seeks redress, not directly for an injury to one of its nationals, but for an injury suffered by itself *through* its national. If this principle were consistently applied, we might expect that the measure of damages would be determined by assessing the injury suffered by the state, and so arriving at a figure which would bear no necessary relation to the extent of the loss suffered by the injured individual. This, however, is not the law; for though in practice tribunals exercise a rather wide discretion in fixing the amount of reparation due, they base it primarily on an estimate of the loss caused to the injured individual, or, if he has lost his life, on the loss caused by his death to his dependants.[1]

§ 7. *The Limits of Criminal Jurisdiction.*[2]

An unfortunate diversity of international practice exists on this matter. It is agreed that a state is com-

[1] For a discussion of some of the difficulties of applying this principle see an article by the present writer, 'The Theory of Implied State Complicity in International Claims', in *B.Y.*, 1928.

[2] Cf. W. E. Beckett in *B.Y.*, 1925, p. 44, and 1927, p. 108.

petent to deal with any offence committed within its territory, without regard to the nationality of the offender. It is agreed also that a state may assume jurisdiction over offences committed by its own nationals abroad, though not all states do so. It is not agreed whether a state may in any circumstances punish a foreigner for an act committed outside its territory, and therefore at a time when he was not subject to that state's criminal law.

One group of states, which includes Great Britain and the United States, denies the right of a state to assume jurisdiction in such a case; another group asserts it in varying degrees. Thus a few states in this latter group, such as Italy and Turkey, claim jurisdiction when the victim of a crime committed abroad is one of their own nationals; and practically all of them claim it over acts committed abroad which are directed against their security or their financial credit, and in practice each of these states defines by its own legislation the acts which fall into those categories. It would appear that if international law allows jurisdiction to be assumed on such grounds, nothing prevents a state which chooses to do so from enacting legislation making it criminal for a foreigner to criticize its administration in the foreign press, or to speculate in its currency on a foreign stock exchange, and the risk of such abuses as these cannot be regarded as fanciful in the present state of international politics.

Great Britain and the United States, however, though they deny the legitimacy of exceptions to the territorial basis of criminal jurisdiction over non-

nationals, admit that in certain circumstances a crime may be committed *within* the territory of a state and therefore be justiciable by its criminal courts, even though the actor may be physically outside the territory. An obvious illustration would be that of a man who fires a gun across a frontier and kills another man in a neighbouring state, and in such a case the jurisdiction of the country from which the gun is fired has been called 'subjective', and that of the country in which the shot takes effect 'objective territorial jurisdiction'. The existence of this objective territorial jurisdiction has been recognized frequently by English and American courts, e.g. in *Rex* v. *Godfrey*,[1] an English court ordered the extradition to Switzerland for trial there of a man who, being himself in England, was alleged to have procured his partner, who was in Switzerland, to obtain goods there by false pretences; and in *Ford* v. *United States*[2] in 1927 the Supreme Court upheld the conviction for conspiracy against the United States' liquor laws of certain British subjects whose ship was at the time on the high seas. Such cases appear to justify the dictum of Judge Moore in the *Lotus* case, mentioned below, that:

'It appears to be now universally admitted that when a crime is committed in the territorial jurisdiction of one state as the direct result of the act of a person at the time corporeally present in another state, international law, by reason of the principle of constructive presence of the offender at the place where his act took effect, does not forbid the prosecution of the offender by

[1] [1923] 1 K.B. 24. [2] 273 U.S. 593.

the former state, should he come within its territorial jurisdiction.'

It is clear that the recognition of an objective territorial jurisdiction by states which do not in terms admit any exception to the territorial basis of criminal jurisdiction, much reduces the gulf between their view and that of states which claim express exceptions from the territorial basis, but even so the gulf remains a wide one. The objective territorial theory does not meet at all the claim of some states to jurisdiction over crimes committed abroad against nationals, and it requires a much closer causal connexion between the act in one state and its effect in another than is required by the theory which gives jurisdiction over all acts abroad which a state may choose to regard as directed against its security or credit.

The Permanent Court of International Justice has recently considered the law on this matter in the case of the *Lotus*,[1] which arose out of a collision in the Aegean Sea outside Turkish territorial waters, between the French mail steamer *Lotus* and the Turkish collier *Boz-Kourt*, in which the *Boz-Kourt* was sunk with loss of life. The *Lotus* proceeded to Constantinople, where the officers in charge of both ships were tried and convicted of manslaughter. The Turkish court appears to have acted under an article of the Turkish Penal Code, giving jurisdiction, with certain limiting conditions, to Turkish courts to try any foreigner who commits an offence abroad to the pre-

[1] Publications of the Permanent Court, Series A, Judgment No. 10.

judice of Turkey or of a Turkish subject. The French Government denied the validity of this article in international law. The majority of the Court, consisting of six judges, refrained from expressing an opinion on the international validity of the provision of the Turkish law, but held that no rule of international law forbade the Turkish Court to assume jurisdiction in the specific facts of this case, since the effects of the offence had been produced on the Turkish vessel, although the actor himself was on board the French vessel. Another Judge, Mr. Moore, agreed with the result at which the majority had arrived, but he held that the provision of the Turkish law was 'contrary to well-settled principles of international law'. It meant, he said, that

'the citizen of one country, when he visits another country, takes with him for his protection the law of his own country, and subjects those with whom he comes into contact to the operation of that law. In this way an inhabitant of a great commercial city, in which foreigners congregate, may in the course of an hour unconsciously fall under the operation of a number of foreign criminal codes. . . . No one disputes the right of a state to subject its citizens abroad to the operations of its own penal laws, if it sees fit to do so. . . . But the case is fundamentally different where a country claims either that its penal laws apply to other countries and to what takes place wholly within such countries, or, if it does not claim this, that it may punish foreigners for alleged violation, even in their own country, of laws to which they were not subject.'

The five remaining judges dissented from the judgment of the Court.

It will be observed that the majority of the Court, by assimilating the Turkish vessel to Turkish territory, brought the case under the principle of the 'objective territorial jurisdiction'. That principle, as stated above, is accepted generally, but its application to the collision of two ships at sea was described by Lord Finlay in his dissenting judgment as 'a new and startling application of a metaphor'. 'The jurisdiction over crimes committed on a ship at sea', he said, 'is not of a territorial nature at all. It depends upon the law which for convenience and by common consent is applied to the case of chattels of such a very special nature as ships. . . . Criminal jurisdiction for negligence causing a collision is in the courts of the country of the flag.' Lord Finlay's view accords with the understanding of maritime law which has been generally accepted hitherto.

§ 8. *Jurisdiction on the High Seas.*

At the time when international law came into existence most maritime states claimed sovereignty over certain seas; for example, Venice claimed the Adriatic, England the North Sea, the Channels, and large areas of the Atlantic, Sweden and Denmark the Baltic. Such claims were often disputed, but the principle that sovereignty might exist over the sea was not. Indeed the modern theory that the open sea is free and common to all would have been unsuited to the times. The state which claimed the seas often rendered a service to all by policing them against piracy; and in return it claimed proprietary rights over them.

It might require ceremonial honours to be paid to its flag; it might reserve the fisheries for itself, or make foreigners take out a licence; it might levy tolls on the ships of other nations; sometimes it even prohibited navigation to them altogether.

It was the abuse of such rights by Spain and Portugal in the sixteenth century that prepared the ground for a reaction against these claims. Under Bulls of Pope Alexander VI of 1493 these two powers claimed to divide the New World between themselves; Spain claimed the whole Pacific and the Gulf of Mexico; Portugal the Indian Ocean and most of the Atlantic, and both excluded foreigners from these vast areas. The claims of the Portuguese in 1609 provoked the *Mare Liberum* of Grotius, in which he maintained that the sea could not be made the property of any state. His attack met with general opposition, and in England John Selden replied to him with the *Mare Clausum*, published in 1635, maintaining the English claims. As yet there was no general hostility to the existence of sovereignty over the sea; what the nations wanted, and what they gradually succeeded in establishing, was freedom of navigation, which was quite consistent with the existence of sovereignty;[1] England, for example, never prohibited navigation over the English seas. But gradually the more extreme claims have been dropped, and by the end of the first quarter of the nineteenth century the freedom of the *open* sea may be regarded as established. There is still, as we have seen, room for disputes on the question what seas are

[1] Cf. Hall, pp. 182–3.

'open' and what are 'territorial', and as late as 1889 the Congress of the United States legislated against seal-killing in large tracts of the Behring Sea, thereby continuing a claim which Russia had upheld there before the cession of Alaska in 1867; the claim, however, was rejected by the arbitrators in 1893. But though the principle of freedom is now established it would be impossible to leave the seas, which are used by the ships of all nations, unregulated by any law, and it is necessary therefore to determine the circumstances in which a state may extend its authority to the seas.

Every state has jurisdiction over ships flying its flag on the high seas; it may apply its law, civil and criminal, to all on board irrespective of their nationality. The justification of this principle is simply that *some* law must prevail on ships, and there is no other law to compete with that of the flag state; it is needless to explain it by regarding ships as floating portions of a state's territory, a metaphor which, if pressed, would lead to the absurd result that the waters surrounding a ship from time to time would be territorial waters. Collisions at sea between two ships of different nationality raise a difficulty. These most commonly give rise to proceedings *in rem*, and according to British practice at least such proceedings may be brought in the courts of any state in which the ship at fault may be found. Criminal proceedings would be taken in the courts of the state of the defendant, but if the decision of the majority in the *Lotus* case[1] is correct, the

[1] *Ante*, p. 187.

state of the injured ship would have concurrent jurisdiction. Jurisdiction over a personal action would be determined by the rules of *private* international law, with which we are not concerned.

It follows from the principle of each state's jurisdiction over its own ships, that no state has a general right to police the high seas. But there are certain special cases in which such a right is admissible. Thus a state may seize and bring into port any ship sailing under its national flag without authority, and such a ship may be confiscated in its courts. Again, if a foreign ship has committed an offence in territorial waters and escaped to the high seas, the pursuit may be continued there and the ship brought back and dealt with; this is called the right of 'hot pursuit', and the condition of its exercise is that the pursuit must follow immediately on the escape of the vessel and be continuous. There are also numerous cases in which by treaty states have accorded to other states certain rights of police or jurisdiction over their ships. Thus the United States, during the era of prohibition, negotiated treaties with many other maritime states, including Great Britain, whereby its authorities might search a private ship within a certain distance outside American territorial waters, and if there were reasonable cause for doing so, might take it in for adjudication by the American courts. The North Sea Fisheries Convention of 1882 gives the signatory states rights of search over one another's fishing vessels, but the adjudication over offences against the fishery regulations is reserved for the state of an offending vessel.

Similar rights have been agreed to for the protection of submarine cables, and for the suppression of slave-trading. Apart from convention slave-trading is not illegal by international law; but during the nineteenth century various conventions were made for the suppression of the trade, e.g. the Congress of Vienna, 1815, declared it illegal; and the Berlin African Conference, 1885, and the Brussels Anti-Slavery Conference, 1890, adopted measures for suppressing it in Africa. The practical difficulty lay always in the extreme reluctance of states to allow their ships to be searched by the ships of other states, but the reduction of slavery itself during the nineteenth century reduced the dimensions of the problem, and these and other treaties eventually gave the armed vessels of one state power to search the suspected ships of another within certain geographical limits. The matter is now regulated by a Convention signed at St. Germain in 1919.

Any state may seize pirates on the high sea and bring them in for trial by its own courts, on the ground that they are 'hostes humani generis'. This applies only to persons who are pirates at international law, and acts may be piratical at municipal law which are not so at international law; for example, in English criminal law it is piracy to engage in slave-trading. There is no authoritative definition of international piracy, but it is of the essence of a piratical act to be an act of violence, committed at sea or at any rate closely connected with the sea, by persons not acting under proper authority. Thus an act cannot be piratical if it is done under the authority of a state,

or even of an insurgent community whose belligerency has been recognized.

The Privy Council has recently made a full examination of the authorities on the definition of piracy, and without attempting an exhaustive definition itself, it has advised that actual robbery is not an essential element in the crime, and that a frustrated attempt to commit a piratical robbery is equally piracy.[1] The ordinary motive of a piratical act is doubtless an intent to rob, but if the other elements of piracy are present the motive is probably immaterial. It may equally well be to kill or merely to destroy.

Self-defence, within the limits defined later, may in exceptional circumstances justify the exercise of authority by a state on the high seas. For example, in 1873 the Spaniards captured on the high seas an American vessel, the *Virginius*,[2] which was on its way to assist insurgents in Cuba. In that action the Spanish authorities were clearly justified, although they afterwards put themselves in the wrong by the summary execution of certain British and American citizens who were on board the *Virginius*.

[1] *In re Piracy jure gentium*, [1934] A.C. 586.
[2] Cf. Hall, p. 328.

VII

TREATIES

CONTRACTUAL engagements between states are called by various names, treaties, conventions, acts, declarations, protocols. None of these terms has an absolutely fixed meaning; perhaps a treaty suggests the most formal kind of agreement; a convention generally, but not always, an agreement less formal or less important; an act generally means an agreement resulting from a formal conference; a declaration is generally used of a law-declaring or law-making agreement, e.g. the Declarations of Paris and of London, but such agreements are equally often called conventions, e.g. the Hague Conventions; protocol is a word with many meanings in diplomacy, denoting the minutes of the proceedings at an international conference, an agreement of a less formal kind, or often a supplementary or explanatory addendum to another treaty, e.g. the Geneva Protocol of 1924, so called because intended to amend the Covenant.

International law has no technical rules for the formation of treaties. In most respects the general principles applicable to private contracts apply; there must be consent and capacity on both sides, and the object must be legal; but naturally, rules peculiar to a special system of municipal law, such as the rules of consideration, have no application. Consent is not invalidated by duress, as in municipal law, for until

international law is strong enough to prevent the settlement of disputes by force, it cannot refuse to recognize an agreement induced by force.

Ordinarily there are two stages in the making of a treaty, its signature by the 'plenipotentiaries' of the contracting states, and its ratification by or on behalf of the heads of those states. There are good reasons why this second stage should be necessary before a treaty, at any rate an important treaty, becomes actually binding. In some states, for example, constitutional law vests the treaty-making power in some organ which cannot delegate it to plenipotentiaries, and yet cannot itself carry on negotiations with other states; for example, in the United States the power is vested in the President, subject to the advice and consent of the Senate. But apart from such cases the interests with which a treaty deals are often so complicated and important, that it is reasonable that an opportunity for considering the treaty as a whole should be reserved. Moreover, a democratic state must consult public opinion, and this can hardly take shape while the negotiations, which must be largely confidential, are going on. These being the reasons that render ratification necessary, it is clearly impossible, as is done by some writers, to specify the circumstances in which a refusal to ratify is justified and those in which it is not. There is no legal nor even a moral duty on a state to ratify a treaty signed by its own plenipotentiaries; it can only be said that refusal is a serious step which ought not to be taken lightly.

Ratification is not, however, a legal requisite in all cases. There are many agreements of minor importance in which it would be an unreasonable formality, and ordinarily the treaty itself shows, either expressly or by implication, whether it is to become binding on signature or not until it has been ratified. Whether, if no indication of intention can be obtained in this way, we are to presume that ratification is intended to be necessary, or that the treaty is to be binding without it, is not certain. Most modern writers have taken the former view, but this has recently been doubted.[1]

Ratification must be unconditional, for modifications of the agreed terms of a treaty cannot be introduced by one party only; a conditional ratification is in effect a new proposal which the other party or parties are free either to accept or reject. This objection does not apply to the common practice of making reservations at the signature of a treaty, for in this case the reservations of a state are known to the other parties, and if they sign and subsequently ratify the treaty, they must be regarded as having accepted the reservations. On the other hand, in modern times, it is not unusual for states which have negotiated among themselves a treaty of general interest, to invite other states to accede to it; such an accession, like ratification, and for the same reasons, must be unconditional.

Article 18 of the Covenant of the League of Nations has added, for states that are members of the League,

[1] See Fitzmaurice, in *B.Y.* 1934, 'Do Treaties need ratification?'

a further requirement for the validity of treaties: 'Every treaty or international engagement entered into hereafter by any member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.' This provision was aimed, not at secret diplomacy, which is inevitable, but at secret treaties, which are often a danger to good relations between states, and it is on the whole a beneficial innovation. But the sweeping terms in which it is framed have created difficulties. The general interest does not require that *all* 'international engagements' should be public, for many are of little or temporary importance; and others, such as certain quite legitimate financial arrangements between states, would lose their efficacy by publication. The article clearly requires the terms of a treaty to be communicated and published, and not the mere fact that a treaty has been made. But the function of the Secretariat is a purely formal or ministerial one; it has no authority to act as a censor of the contents of the treaty. When the Irish Free State presented the Anglo-Irish Treaty of 1921, Great Britain protested that this was not a 'treaty' to which the article applied, but the document was registered together with the notes of the two governments. There is some ambiguity in the provision that the treaty is not to be 'binding' until registered, which seems to imply that the parties can withdraw from a treaty up to the moment of registration; more probably, however, they are merely

debarred from demanding execution of the treaty until after registration.[1]

There are no technical rules in international law for the interpretation of treaties; its objective can only be to give effect to the intention of the parties as fully and fairly as possible. But lawyers who are trained in the methods of interpretation applied by an English court should bear in mind that English draftsmanship tends to be more detailed than Continental, and it receives, and perhaps demands, a more literal interpretation.[2] Similarly, diplomatic documents, including treaties, do not as a rule invite the very strict methods of interpretation that an English court applies, for example, to an Act of Parliament. In particular the method of *historical* interpretation, which allows the history of negotiations to be examined for the purpose of ascertaining the intention of the parties, as well as the actual terms of the treaty in which they have attempted to express this intention, is admissible in international law; though the Permanent Court has more than once pointed out that this method should be resorted to only when the terms of the treaty itself are not clear.[3]

If the proper construction of a treaty is that the parties to it intended to confer a right to enforce the treaty on a state not a party to it, the Permanent Court has held that there is nothing in international law to prevent effect being given to this intention. It

[1] See Hudson, in *A.J.*, 1925, p. 273, and 1930, p. 752.
[2] Cf. Westlake, *International Law*, Part I, p. 282.
[3] e.g. Series A, Judgment no. 9, p. 16.

is not, they say, to be lightly presumed that this was the intention; but in each case it must be ascertained 'whether the states which have stipulated in favour of a third state meant to create an actual right which the latter has accepted as such'. In the case from which these words are taken, *The Free Zones of Upper Savoy and the District of Gex*,[1] the Court thought that a right had been conferred on Switzerland by a treaty to which she was not a party to have the French customs withdrawn behind the political frontiers in the District of Gex.

Of the methods by which a treaty may be discharged,[2] some, such as mutual consent, performance of the obligations under it, or the expiration of a time-limit need no special discussion. But there are more difficult cases. From the time of Grotius[3] many writers have propounded the view that the breach of *any* term of a treaty by one party will release the other from all obligations of the treaty, but this doctrine, applied to any of the more important treaties, would lead to results so startling that it has never been adopted in international practice, and ought equally to be rejected by legal theory. Common sense seems to impose a distinction, though this may not always be easy to draw, between terms which are material to a main object of the treaty and those which are not.[4]

[1] Series A/B, No. 46, at p. 147.

[2] On this question see McNair, *La Terminaison et la dissolution des traités*, in Hague *Recueil*, 1928, vol. xxii, p. 463.

[3] *De jure belli*, ii. 15, 15.

[4] The treatment of this question by Hall, *International Law*, 8th ed., p. 408, is admirable.

One of the most difficult and practically important questions of the law of treaties relates to the termination of treaties which contain, at any rate in their expressed terms, no provision for that purpose. Such treaties raise two questions which require discussion; firstly, whether one party may in any circumstances give notice to terminate such a treaty without the consent of the other, and secondly, whether it is liable to be terminated by the operation of any rule of law.

The answer to the former of these questions is probably that we must inquire into the intention of the parties.[1] There is certainly no general right of denunciation of a treaty of indefinite duration; there are many such treaties in which the obvious intention of the parties is to establish a permanent state of things, for example, the Pact of Paris; but there are some which we may fairly presume were intended to be susceptible of denunciation even though they contain no express term to that effect. A *modus vivendi* is an obvious illustration; treaties of alliance and of commerce are probably in the same case.

The second question brings us to the great problem of the obligatory force of treaties in general.

It is a truism to say that no international interest is more vital than the observance of good faith between states, and the 'sanctity' of treaties is a necessary corollary. On the other hand, the circumstances in which a treaty was made may change, and its obligations may become so onerous as to thwart the development to which a state feels itself entitled; and when this

[1] Cf. McNair, loc. cit., p. 526.

happens, it is likely, human nature being what it is, that a state which feels itself strong enough will disregard them, whether it has a legal justification for doing so or not. This is particularly likely to happen when a treaty has been imposed on a state after defeat in a war; and while it may be expedient in the present state of international relations to uphold the principle which declares such a treaty to be as binding in law as one voluntarily entered into on both sides, it argues a lack of candour to support that practice by appealing to moral considerations, as we do when we speak of the 'sanctity' of all treaties without distinction. It may be, therefore, that if international law insists too rigidly on the binding force of treaties, it will merely defeat its own purpose by encouraging their violation.

Every system of law has to steer a course between the two dangers of impairing the obligations of good faith by interfering with contractual engagements, and of enforcing oppressive or obsolete contracts. In our national law we have long ceased to regard absolute freedom of contract as either possible or socially desirable; our courts will not enforce contracts which have been induced by fraud or duress, or whose object is contrary to public policy, and legislative interference with contracts becomes more and more active as social relations become more complicated. But no such process has yet been possible in international law, and one or two illustrations from recent history will show how dangerous is the problem which awaits solution.

By the Treaty of Paris, 1856, the Black Sea was declared to be neutralized, and Russia, which had just

been defeated in the Crimean War, agreed not to maintain a fleet on it. In 1870 she took advantage of the Franco-German War to repudiate this obligation. Great Britain protested against this action, and eventually the powers that had been parties to the Treaty of Paris agreed, in the Treaty of London, 1871, to release Russia from the restriction; and they solemnly united in this declaration: 'It is an essential principle of the Law of Nations that no power can free itself from the engagements of a treaty, nor modify its terms, except with the assent of the contracting parties by means of a friendly understanding.' No doubt it was impressive that the chief powers of Europe should unite in maintaining the sanctity of treaties, even while they condoned the breach of one by Russia, but it was also very futile; in effect they were burying their heads in the sand, and refusing to admit that a real problem existed. Again, by the Treaty of Berlin, 1878, Bosnia and Herzegovina, provinces of Turkey, were to be 'occupied and administered' by Austria-Hungary; and Bulgaria was to be an autonomous principality under the suzerainty of the Sultan. In 1908 the Prince of Bulgaria took advantage of the Young Turk Revolution to declare Bulgaria independent; at the same time Austria took advantage of Russia's weakness after the Russo-Japanese War to annex Bosnia and Herzegovina. Sir E. Grey protested against these violations of the Treaty of Berlin, and demanded a conference to consider whether its revision was necessary; but in the end the violations had again to be condoned.

Once again in April, 1935, the Council of the League reaffirmed the declaration of 1871, and solemnly condemned Germany's repudiation of the military articles of the Treaty of Versailles. On each of these occasions a state had a strong moral claim to be released from the obligation of a treaty; it was certain that it would some day demand to be released; and yet it was politically most improbable that it could ever satisfy that demand by action within the law. J. S. Mill, writing of the Russian action in 1870, uttered a warning which international law has yet to take to heart:

'If a lawless act has been committed in the present instance, it does not entitle those who imposed the conditions to consider the lawlessness only, and to dismiss the more important consideration whether, even if it was wrong to throw off the obligation, it would not be still more wrong to persist in enforcing it. If, though not fit to be perpetual, it has been imposed in perpetuity, the question when it becomes right to throw it off is but a question of time. No time being fixed, Russia fixed her own time, and naturally chose the most convenient.'[1]

Mill also suggested two rules for adoption by the nations; 'they should abstain from imposing conditions which, on any just and reasonable view of human affairs, cannot be expected to be kept. And they should conclude their treaties, as commercial treaties are usually concluded, only for a term of years.'

These are counsels of perfection which states at present are not always willing to follow. In the mean-

[1] Quoted from the *Fortnightly Review* by Moore, *Digest of International Law*, vol. v, p. 339.

time the problem of the attitude of international law to oppressive or obsolete treaty obligations remains, and an attempt has been made by many writers to solve it by the doctrine known as the *clausula rebus sic stantibus*. In every treaty, it is said, there is implied a clause which provides that the treaty is to be binding only 'so long as things stand as they are'; the expressed terms may be absolute, but a treaty is never more than conditional, and when a 'vital change of circumstances' has occurred, the condition of the treaty's validity has failed, and it ceases to be binding.

Such a doctrine, if it is to be accepted into the law, clearly needs careful definition. Otherwise it is capable of being used, and it often has been used, merely to excuse the breach of a treaty obligation that a state finds it inconvenient to fulfil. For example German controversialists appealed to it to justify the violation of Belgian neutrality in 1914, and Turkey to justify her unilateral abrogation of the Capitulations.

There seems to be no recorded case in which its application has been admitted by both parties to a controversy, or in which it has been defined or applied by an international tribunal. But in the case of the *Free Zones of Upper Savoy and the District of Gex*[1] the Permanent Court had to consider an argument by France that the provisions made after the Napoleonic Wars for the withdrawal of the French customs lines some distance behind the Franco-Swiss boundary should be held to have lapsed owing to a change of circumstances. The change alleged was that whereas in 1815 the with-

[1] Series A/B, No. 46, at p. 155.

drawal of the customs line had made of Geneva, then practically a free trade area, together with the 'Free Zones', an economic unit, the institution of Swiss federal customs in 1849 had destroyed this unit. The Court said that to establish this position it would be necessary to show that it was *in consideration* of the absence of customs duties at Geneva in 1815 that the Zones were created, and this France failed to prove.

No doubt it may be necessary to read into a treaty, as we often must into a contract, provisions which the parties have not expressed, since otherwise the real intentions of the parties would often be defeated. Thus English Law deals with cases where the objects of a contract have been 'frustrated' by a change of circumstances, by a doctrine which was thus expressed by Mr. Justice Russell in *In re Badische Company Ltd.*:[1] 'If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances'; but in English law the contract is not dissolved by a change of circumstances as such, however vital, but only if an implied term can fairly be read into the contract itself to the effect that it is to be dissolved in the event that has happened. The English doctrine therefore attempts to fulfil the intention of the parties, not to defeat it.

The doctrine cautiously hinted at by the Permanent

[1] [1921] 2 Ch. at p. 379.

Court in the *Free Zones* case is perhaps not very different from this. It indicates at least that a change of conditions *may* affect the obligations of a treaty, but that to do so the change must relate to conditions which were a factor in the minds of the parties inducing them to make the treaty. A doctrine so limited is entirely reasonable, but it has very little to do with the problem of obsolete or oppressive treaties, for which it is too often supposed to be the solution.

We may well hold that the obligation of a treaty in international law comes to an end if an event happens which the parties *intended* should put an end to it, or in consideration of the continuance of which they made the treaty; the more difficult problem concerns a treaty which the parties did *not* intend to be ended, but which it would be oppressive to enforce, and which will probably in fact be violated, in the events which have happened. It has been suggested, as an application of the doctrine of *rebus sic stantibus*, that 'when the existence, or the vital development, of a State stands in unavoidable conflict with its treaty obligations, the latter must give way',[1] but, with all deference, it is suggested that this is an essentially unjuridical doctrine, and that even if political motives sometimes lead to a treaty being treated as 'a scrap of paper', international lawyers need not invent a pseudo-legal principle to justify such acts.

The problem of oppressive or obsolete treaties is essentially part of a wider problem. Indeed the danger to international order comes more often from

[1] Oppenheim, *International Law*, 4th ed., vol. i, p. 748.

oppressive *conditions*, and especially frontier conditions, whether these were or were not originally created by a treaty, than from oppressive obligations in a still executory treaty. But the 'sanctity of treaties' will never be more than a cant phrase so long as the law is too weak to deny the validity of a treaty entered into under coercion, or to lay down canons of international public policy, comparable to those of municipal law, which shall be conditions of any treaty's validity *ab initio*. In part the ultimate solution can probably be found only in some quasi-legislative international action, comparable to the legislative interferences which modify the obligations of private contracts within a state in the interests of social order. This method of attacking the problem is foreshadowed by Article 19[1] of the Covenant, which, if only as a recognition that there is a problem to be solved, at least marks an advance on the declaration of the powers in 1871, which has been quoted above.

[1] *Vide supra*, p. 69.

VIII

DISPUTES BETWEEN STATES

§ 1. *Amicable Methods of Settlement.*

CONFUSION has been introduced into discussions of the problem of preserving international peace by the unfortunate practice of using the word 'arbitration' as though it meant nothing more than the peaceful settlement of a dispute. Actually arbitration is a definite legal process, and only one among several methods of peaceful settlement; it is not the only alternative to war. The loose usage of the word is more than a mere matter of terminology; it leads to loose thinking about the problem, for controversy passes unconsciously from one meaning of the word to the other, and gives a false impression of simplicity to what is really the most complicated question of international relations.

In general we may say that the problem of effecting the peaceful settlement of a dispute between two individuals or two states admits of two alternative methods of approach; we may either induce the disputing parties to accept terms of settlement which are dictated to them by some third party, or we may persuade the parties to come together and agree on terms of settlement for themselves. In the international field the former of these methods takes the form either of arbitration, or of judicial settlement, the latter either of good offices, or mediation, or conciliation.

§ 2. *Arbitration and Judicial Settlement.*

These two procedures are closely allied; indeed the former is only a species of the latter, for an arbitrator is a judge, although he differs from the judge of a standing court of justice in being chosen by the parties, and in the fact that his judicial functions end when he has decided the particular case for which he was appointed. The distinction is important, because a standing court is able to build up a judicial tradition and so to develop the law from case to case; it is, therefore, not only a means of settling disputes, but to some extent a means of preventing them from arising. But so far as the parties are concerned, they are as likely to get a satisfactory decision from a court of arbitration as from a court of justice, and there may even be special circumstances which make the former a preferable tribunal; for example, some special technical skill in the members of the court may be more important than a profound knowledge of law. Arbitrators and judges are alike bound to decide according to rules of law; neither possess a discretionary power to disregard the law and to decide according to their own ideas of what is fair and just. No doubt the parties, if they choose, may confer such a power on an arbitrator, or they may agree on special rules which he is to apply to the exclusion of the ordinary rules of law, but they may also confer a special power of this kind on a judge, as is expressly provided in Article 38 of the Statute of the Permanent Court of Justice. It should be added, however, that the purely judicial character

of an arbitrator's function is not always recognized, and the Continental view of it seems to be less strict than our own; at any rate, some Continental arbitrators have expressly claimed a discretionary power to give what they regard as a just, rather than a strictly legal, decision. In practice also, courts of arbitration have not always given the reasons on which their decisions were based, so that it is impossible to be sure what view they may have taken of their function.

Arbitration was a fairly frequent method of settling international disputes in medieval times, but with the rise of the modern state system it fell into disuse until its revival in the nineteenth century, largely through the example of Great Britain and the United States in submitting the Alabama Claims to arbitration in 1871. Many different ways of constituting the court have been tried; sometimes the head of some foreign state has been appointed, and the award is given in his name, though he is not expected to act personally; sometimes the arbitrators have consisted of representatives of the disputing states, with or without the addition of other members. In the present century a very large number of standing arbitration treaties have been entered into, the earliest being one between Great Britain and France in 1903, which provided that 'differences of a legal nature or relating to the interpretation of treaties' were to be referred to the Hague Permanent Court of Arbitration, provided 'they do not effect the vital interests, the independence, or the honour of the two states, and do not concern the interests of third parties'. In each case a special agree-

ment has to be concluded defining the matter in dispute and the scope of the arbitrator's power. This model has been largely followed, but it is noteworthy that whenever the United States have made such a treaty, the Senate has insisted on treating the special agreement as a treaty, thus refusing to give a general consent to arbitrate differences, and making its own special consent a necessary condition of each proposed reference.

It is clear that the 'vital interests' clause in these treaties seriously weakened their practical force, for in effect it left the parties free to refuse to arbitrate whenever they thought fit. But this clause only gave a rather unfortunate expression to the fact, not always sufficiently realized by its advocates, that arbitration is not, and cannot be made, a suitable method for settling disputes of every kind. On the whole, however, such value as the treaties had lay rather in expressing the general sentiment of most states in favour of peaceful settlement, than in any practical influence on events, for it is improbable that any dispute has ever been arbitrated in virtue of one of these treaties which would not have been arbitrated in any event. A more useful side of the modern movement for encouraging resort to arbitration and judicial settlement is to be found in the institution of convenient machinery for the purpose, which, without interfering with the freedom of states to agree on any other method, is always available if they care to use it. This development has given us the Permanent Court of Arbitration, and the Permanent Court of International Justice.

The former was created by the Hague Convention for the Pacific Settlement of International Disputes, made in 1899, and revised in 1907. Each State signatory to the Convention appoints four members, and when two states refer a dispute to the Court, each, unless they agree otherwise, selects two arbitrators from the members, of whom only one may be a national, and the four arbitrators then choose an umpire. The machinery has proved simple and useful, and several important cases have been heard by the Court, including the Newfoundland Fisheries case between Great Britain and the United States in 1910. But the name 'Permanent Court' is a misnomer. There is a *permanent panel of arbitrators*, but the Court itself has to be constituted anew for each case.

The Permanent Court of International Justice was created by a treaty, generally called the 'Statute' of the Court, in 1921. The Statute was revised in 1929, but the amendments have not yet come into force. The judges are appointed by the following procedure: Each of the national groups of members of the Permanent Court of Arbitration nominates not more than four persons, who must be qualified in their own country for the highest judicial office or be jurisconsults of recognized capacity in international law, and not more than two of whom may be fellow nationals of their nominators, as candidates for appointment as judges. The object of this step in the procedure is to reduce the likelihood of political influence, by not giving the power of nominating candidates to the governments, but it is probable that this result has not been

achieved, and indeed there is no very strong reason why the nominations should not be governmental. From the list of candidates so made up the Council and the Assembly of the League each separately choose fifteen judges and four deputy judges. Any person who is chosen by a majority vote in both bodies is elected, except that if two persons of the same nationality are chosen, only the elder becomes a member of the Court. There are detailed provisions to meet the event of the Council and Assembly being unable to agree on the full number of judges; and in the event of a deadlock between the two bodies, which has not yet occurred, vacant places are to be filled by the judges already elected. This double election was intended to secure that each of the Great Powers, who in 1921 formed a majority in the Council, should be assured of a judge on the Court, but as the Great Powers no longer have that majority it no longer serves that purpose, and in any case the protection is unnecessary, because there is no tendency among smaller powers to wish to deprive a Great Power of its judge. A judge is elected for nine years and is re-eligible; he can be dismissed only if in the unanimous opinion of the other members of the Court he has ceased to fulfil the required conditions. It is possibly a defect in the scheme, that all the judges are elected at the same time; there is thus a possibility every nine years of a break in the continuity of the Court. The quorum of judges is nine; but a smaller Court may sit to hear certain classes of cases, such as those in which the parties desire a speedy decision by summary pro-

cedure. A judge of the same nationality as one of the parties retains the right to sit, but if only one party has a judge of its nationality on the Court, the other may nominate one for the particular case. This provision for *ad hoc* 'national' judges can only be defended if it is necessary, as perhaps it is, for political reasons. It is a concession to the vicious theory that in some sense a judge ought to 'represent' the parties, and it places the 'national' judge himself in a most difficult position.

The Court is open to all states members of the League, or mentioned in the Covenant, and to others on conditions laid down by the Council of the League. Its jurisdiction covers 'all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force'. In principle, therefore, the jurisdiction arises only when the parties have agreed to submit a dispute to it; but in fact the Court also possesses a quasi-compulsory jurisdiction in two ways: (i) a large number of treaties have provided in general terms for submission to the Court of disputes arising under them; and (ii) Article 36 of the Statute contains an optional clause, whereby members may declare 'that they recognize as compulsory *ipso facto* and without special agreement in relation to any other members accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning (*a*) the interpretation of a treaty, (*b*) any question of international law, (*c*) the existence of any fact which, if established, would constitute a breach of an international obligation, (*d*) the

nature or extent of the reparation to be made for the breach of an international obligation'.

The 'Optional Clause' has been accepted by a large majority of the members of the Court, but many of these have attached reservations to their acceptances. There are some ambiguities in the wording of the clause itself,[1] and there are many others in the various reservations, so that it may conceivably be difficult to define the precise obligation which any particular state has undertaken. Article 36, however, goes on to provide that 'in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court'.

The British acceptance of the clause, which was given in 1929, applies only to 'disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to the said declaration'. It would be difficult to devise a more indefinite formula; but one thing at least is clear about it, that it most seriously limits the scope of our undertaking. The British declaration then excepts three classes of disputes, those in regard to which the parties agree on some other method of peaceful settlement, those with other members of the British Commonwealth, and those with regard to questions which by international law fall exclusively within the jurisdiction of the United Kingdom. The first of these is not a very serious limitation; the second is a matter of imperial policy; the third seems to have been added, *ex abun-*

[1] For a discussion of these, see Fischer Williams, *Chapters on Current International Law*, p. 38.

danti cautela, at the instance of certain of the Dominions, to exclude a class of dispute which the Court would in any case not have had jurisdiction to decide, since it could only say that by international law the question referred to it was exclusively within the jurisdiction of the United Kingdom. Finally, the British acceptance is subject to a condition that by giving notice we may require proceedings in the Court to be suspended in respect of any dispute which has been submitted to the Council of the League, such suspension being limited to twelve months, unless the parties agree, or the Council decides, to extend it. The object of this provision is apparently to provide an opportunity for settlement by conciliation, but the time limit makes it not very important.[1]

The law that the Court is to apply is, as already stated, laid down as follows: (1) international conventions, (2) international custom as evidence of a general practice accepted as law, (3) the general principles of law recognized by civilized nations, (4) judicial decisions and teachings of publicists as subsidiary means for the determination of the law, and (5) if the parties agree, it may decide *ex aequo et bono*.[2]

Besides its contentious jurisdiction over disputes referred to it by states, the Court, under Article 14 of the Covenant, 'may give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly'. The Court has consistently

[1] For a penetrating analysis of the British reservations see Lauterpacht, in *Economica*, 1930, p. 137.

[2] *Supra*, p. 46.

treated its advisory jurisdiction as a judicial function, and it has assimilated the proceedings in most respects to that used in the contentious jurisdiction. In 1923 the Council, at the instance of Finland, requested an opinion on the obligations of Russia in Eastern Carelia under the Treaty of Dorpat, 1920; the Soviet Government, however, refused to take part in any discussion before the Court, and in these circumstances the Court declined to give an opinion, holding that to do so without the co-operation of both parties would be to depart from the essential rules guiding its activity as a court of justice. In practice the advisory jurisdiction has proved unexpectedly important, for the Council of the League, which is a political body, is often glad to avoid the embarrassment of having to make a decision, by referring a legal issue to the Court. It is true that the opinion of the Court when given, being only advisory, does not bind the Council, but it would not be easy for the Council to reject it, and hitherto it has never done so. This makes important the question, as yet undecided, whether the Council, in asking the Court for an opinion, must be unanimous, or whether the request for an opinion is a 'matter of procedure', in which the Council may act by a majority. The significance of this question is, that whereas the jurisdiction of the Court is in principle, as we have seen, voluntary, it would indirectly become virtually compulsory if an advisory opinion on a dispute can be requested without the consent of the parties.

Other points of interest in the Statute of the Court are, that cases must be heard in public unless the

Court decides otherwise or the parties demand a private hearing; that reasons for the decision are to be stated, and dissenting judgments may be given; that the official languages are French and English, but the Court may authorize other languages; that decisions are only binding between the parties and for the particular case. This last provision merely means that the binding authority which Anglo-American law attaches to precedents will not apply to the decisions of the Court; it does not mean that the decisions will not be quoted as precedents, or that the Court will not strongly incline to follow them, for no court can be indifferent to its own previous decisions.

§ 3. *The Limits of Arbitration and Judicial Settlement.*[1]

It has been a common assumption among international lawyers that not all disputes between states are 'justiciable', that is to say, susceptible of decision by the application, in an arbitral or judicial process, of rules of law. This is a mere truism in one sense, because it is obvious that, so long as states are not compelled to submit to legal process, no dispute is 'justiciable' unless the parties have made it so by undertaking an obligation to treat it as such. But the distinction between 'justiciable' and 'non-justiciable' disputes usually implies more than this; it implies the belief that international disputes are of two distinct kinds, one of which, the justiciable or legal, is in-

[1] For a full discussion of this question see Lauterpacht, *Function of Law in the International Community*, Ch. I and *passim*.

herently susceptible of being decided on the basis of law, while the other, the non-justiciable or political, is not.

International lawyers, at any rate until recently, have generally agreed that this distinction exists, but they have not been agreed on its content. One view commonly held has been that a justiciable dispute is one for which a rule of law applicable to the dispute exists. This implies that for other disputes, the non-justiciable, no applicable rules exist in the law, and accordingly that a court of law called upon to deal with such a dispute would find itself unable to pronounce a decision. It has already been shown[1] that this difficulty is imaginary. It is a corollary of the extreme positivist view of the nature of international law, according to which, since nothing is law except the rules that states have consented to, the number of legal rules is necessarily finite. It overlooks the dynamic element, which the international, like every other, system of law reveals as soon as it ceases to be a merely academic study and begins to be applied to factual situations by the accepted processes of judicial reasoning.

International law then is never formally or intrinsically incapable of giving a decision, on the basis of law, on the respective rights of the parties to any dispute, and if that is so, we must look for the difference between justiciable and non-justiciable disputes elsewhere than in some assumed specific quality which distinguishes that law from other systems. Probably

[1] *Supra*, p. 56.

to-day most writers would regard it as depending upon the attitude of the parties: if, whatever the subject-matter of the dispute may be, what the parties seek is their legal rights, the dispute is justiciable: if, on the other hand, one of them at least is not content to demand its legal rights, but demands the satisfaction of some interest of its own even though this may require a change in the existing legal situation, the dispute is non-justiciable. It is certain that many disputes, probably most of the serious disputes, of states are of this kind, and this is an important fact in the relations of states, of which, whether we like it or not, we must take account. But it does not supply what the controversy on the subject has assumed to exist, an objective test whereby we may classify disputes into two kinds; it does not enable us to predict, merely from a knowledge of the subject-matter of a dispute, that it will be justiciable or that it will be non-justiciable; it merely reminds us of an already known fact, namely, that states do sometimes regard a decision on the basis of law as a satisfactory method of disposing of their disputes, and that sometimes, for whatever reason, good or bad, they or at least one of the states concerned does not.

No lawyer is likely to doubt the desirability of a much greater readiness on the part of states than they at present show to accept the settlement of their disputes on the basis of law. The present unlimited freedom of states to reject that method of settlement is entirely indefensible; it makes possible the grossest injustices, and it is a standing danger to the peace of

the world by encouraging the habit of states to regard themselves each as a law unto itself. On the other hand, the problem is not a simple one, and it is not likely to meet a quick solution, such as was aimed at in the General Act of Geneva of 1928, by the acceptance of existing law as a universally applicable basis for the settlement of all disputes. A declaration of their legal rights when states are quarrelling about something other than their rights is not in any true sense a 'settlement' of their dispute: it may occasionally facilitate a settlement by subsequent agreement, but it may not improbably have exactly the opposite effect by making a compromise seem unnecessary to the party that is satisfied with the declaration. It is tempting to appeal to the analogy of the individual and his relation to the courts of the state, but this is in many respects misleading. International law at its present stage of development gives a far less effective protection to the reasonable interests of states than does the law of a civilized constitutional state to those of individuals, both because the substance of the law is defective relatively to the interests which it ought to be able to protect, and because the circumstances in which it has to be administered are more difficult. Thus of many anti-social acts which affect the perfectly reasonable interests of another state, international law, if appealed to, could only say that they are matters exclusively within the domestic jurisdiction of the state whose conduct is in question, and therefore that no legal right of the injured state has been violated. A national court, again, is normally sup-

plied with a body of well-established doctrine; its judges share the traditions and sentiments of those to whom they administer justice; and a regular system of appeals exists to correct their mistakes; but none of these safeguards exists in the international system.

These differences are not likely to be overlooked, but there are also certain limitations on the potentialities of judicial procedure in general which it is well to bear in mind. One is that a dispute does not necessarily receive its quietus because a court of law may have pronounced upon it. There are historical instances in which the decisions of courts have had exactly the reverse effect, and have been contributory causes of the outbreak of war. This is true of Hampden's case in 1637, in which the Court declared the law on the question of ship-money, and of the Dred Scot case in 1857, in which the American Supreme Court declared the law on the question of slavery; each of these cases had its sequel in a civil war which was fought in part to determine afresh the very issues which the courts had decided.

Further, it ought never to be forgotten that law is not merely a convenient device for the settlement of disputes; it is not something that can be made an effective instrument at a crisis and left out of account at other times; it is useful as a means of settlement only when, and so far as, a society has accepted the rule of law as its way of life. It is only because the judicial organs of a state are part of the whole complicated machinery of a state's government that they are able

to work with the relatively high degree of efficiency to which we are accustomed. In fact the example of the state, if it is examined more closely, is discouraging to the view that all disputes ought to or can be settled on the basis of existing law, for international disputes find their nearest analogy not in the disputes of individuals at all, but in a class of disputes which the practice of states itself tends to treat by political rather than judicial methods. By their very nature they are differences between large associated groups; and when such a group of persons within the state is discontented with its existing legal rights, a wise government does not merely refer them to the courts of law; it considers the arguments for and against a change of the law. When states are so minded and so organized that they too can deal with the more difficult disputes in this spirit, not only will peace be more secure than it is at present, but the judicial system itself, within its proper sphere, will be established on a firmer foundation.

Some of these difficulties of devising an all-inclusive scheme for the settlement of disputes would doubtless not apply if arbitrators or judges, instead of being required to give decisions based on existing law, were given a discretion to decide *ex aequo et bono*, when the legal situation seems to them to be in conflict with the justice of the case. It has already been mentioned that the Statute of the Permanent Court provides for a decision of this kind 'if the parties agree'; and though this particular provision has not yet been used, the method is frequently used with advantage in the settle-

ment of differences of secondary importance. After the proceedings before the Permanent Court in the *Free Zones* case[1] France and Switzerland, being dissatisfied with the position established by the decision for the commerce between the Free Zones and Switzerland, but unable to agree on the changes to be introduced, empowered an arbitral tribunal to lay down a 'more liberal and legally more stable régime', and the regulations laid down by this tribunal themselves contain a provision that, in default of agreement, an arbitral tribunal, deciding *ex aequo et bono*, may in the future adapt them to new economic conditions.[2] It would, however, be a very different matter to extend this method of settlement by making it compulsory, even in the last resort, for all disputes.

A judge or an arbitrator applying legal principles is an expert, and his opinion that such and such are the rights of the parties has a special value; but an arbitrator's opinion of what is fair and right cannot be based on any objective standard and is worth intrinsically neither more nor less than that of any other equally fair-minded and intelligent person. At any moment an international incident might arise out of the insistence on the Monroe doctrine by the United States, the dissatisfaction of Germany with her Eastern frontiers, or the ambition of Italy for more colonial territory, but any of these problems would raise an essentially *political* question, susceptible

[1] *Supra*, p. 205.

[2] For references see Habicht, *Power of the International Judge to give a decision ex aequo et bono*, pp. 78 and 84.

of amicable settlement no doubt, but only by appropriate *political* methods, by negotiations, by compromise, by mediation or conciliation; there is not the smallest chance that they would or could be settled by the *ipse dixit* of an arbitrator.

The true nature of the power which would be entrusted to the arbitrators should be understood; a power to decide *ex aequo et bono* is a power to abrogate or modify existing legal rights, and essentially that is a power to *legislate*. However urgent it may be to create a procedure for the orderly modification of international legal rights in proper cases, it is inconceivable that the solution will be found in the simple plan of handing over to arbitral tribunals, responsible for their decisions only to their own consciences, a function which states are not yet prepared to concede to an international legislature. Legal rights ought not to be immutable, but a system in which one state could be required, on the mere demand of another, to put in issue its legal rights on any matter about which the two were in controversy would be as unreasonable as it is improbable.

§ 4. *Good Offices, Mediation, Conciliation.*

In these modes of composing a quarrel, the intervention of a third party aims, not at *deciding* the quarrel for the disputing parties, but at inducing them to decide it for themselves. The difference between the two first terms is not important; but strictly a state is said to offer 'good offices' when it tries to induce the parties to negotiate between themselves, and to 'medi-

ate' when it takes a part in the negotiations itself, but clearly the one process merges into the other. Both, moreover, are political processes, which hardly fall within international law. The Hague Conventions for the Pacific Settlement of International Disputes declare it to be desirable that powers strangers to a dispute should offer their good offices and mediation, and such an offer is not to be regarded as an unfriendly act.

The same Conventions also introduced a new device for the promotion of peaceful settlements, in Commissions of Inquiry, whose function was simply to investigate the facts of a dispute and to make a report stating them; this report was not to have the character of an award, and the parties were free to decide what effect, if any, they would give it. The Commission was to be constituted for each occasion by agreement between the parties. This machinery was used with good effect in the Dogger Bank dispute between Great Britain and Russia in 1904.

The idea underlying these Commissions, that if resort to war can only be postponed, and the facts clarified and published, war will probably be averted altogether, inspired the so-called 'Bryan treaties', the first of which was concluded between Great Britain and the United States in 1914. Under these the parties agree to refer 'all disputes of every nature whatsoever' which cannot be otherwise settled to a standing 'Peace Commission' for investigation and report, and not to go to war until the report is received, which must be within a year. The Commission consists of one

national and one non-national chosen by each party, and a fifth, not a national of either party, chosen by agreement. It should be noted that no disputes whatsoever are excluded from the operation of these treaties.

The method of the Bryan treaties has been extensively adopted in recent developments of international organization, and as it is essentially different from the method of arbitration on the one hand, and not precisely the same as that of mediation on the other, it is convenient to refer to it as 'conciliation'. It has been defined as 'the process of settling a dispute by referring it to a commission of persons whose task it is to elucidate the facts and . . . to make a report containing proposals for a settlement, but not having the binding character of an award or judgement'.[1] Conciliation, therefore, differs from arbitration, because in it terms of settlement are merely proposed, and not dictated to the disputing states; it is therefore, unlike arbitration, a method appropriate to any dispute whatsoever.

The most comprehensive scheme of conciliation is that contained in Article XV of the Covenant of the League of Nations;[2] but machinery of conciliation has been set up by many recent treaties between particular states, notably by those of Locarno in 1925. Each of the so-called 'arbitration conventions' which were concluded at Locarno sets up a 'Permanent Conciliation Commission' of five persons, consisting of one national of each of the signatory states and three non-nationals; disputes 'as to the respective rights' of the

[1] Oppenheim, *International Law*, 5th ed., vol. ii, p. 12.
[2] *Infra*, p. 236.

parties *may* by agreement be referred to the Commission, but if not settled there, they *must* be referred to arbitration or to the Permanent Court; other disputes *must* be referred to the Commission. Its task is to 'elucidate questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise, and to endeavour to bring the parties to an agreement . . . at the close of its labours the Commission shall draw up a report'.

§ 5. *Settlement under the League Covenant.*

By Article 10 of the Covenant the members of the League undertake

'to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.'

The Article is clearly not directed, as has sometimes been suggested, against change in the existing international situation as such, but only against change brought about by 'external aggression', that is to say, by violence from the outside. It contains a twofold obligation, to 'respect' and to 'preserve'; and at first sight these might seem to be absolute obligations which the members of the League have undertaken whatever the cost of fulfilling them may be. But the succeeding words seem to show that this is not the intention. The Council is to 'advise' on the means of fulfilling 'this obligation' (that is to say, the obligation

to 'preserve', since the means of fulfilling the obligation to 'respect' can hardly require deliberation); and this 'advice' seems to be the event upon which the obligation to take action arises. Even then the members have not bound themselves to accept the Council's advice; the final decision on the action which each of them will take to fulfil its obligation remains with the member itself. Moreover, it has not yet been decided whether the Council, in giving its advice, must be unanimous, or unanimous except for the votes of the interested parties, or may act by a majority. There is no express provision taking the case out of the general rule of unanimity; but, on the other hand, the principle that a party shall not be a judge in its own cause is one of universal validity and may well be held to be implied in this Article, since it would be almost farcical to hold that the state which is accused of aggression should be able to veto the measures proposed to be taken to check it. The argument in favour of a mere majority being sufficient is weaker; it is based on the wording of Article 5, which requires unanimity for 'decisions' of the Assembly or the Council, and on the view that the mere giving of 'advice' is not a 'decision'.[1]

The preceding discussion shows that the difficulties of giving practical effect to Article 10 are numerous and serious. Actually it has never been applied, though it has been frequently appealed to, notably by China in 1932 and by Abyssinia in 1935. The

[1] See Riches, *The Unanimity Rule and the League of Nations*, esp. pp. 134 et seq.

Assembly, in February 1933, adopted a report, Japan alone dissenting, which implied that Japan had violated the Article, but the Council did not proceed to 'advise'. In the Italo-Abyssinian dispute action was taken, not under this Article, but under Article 16.

Article 11 has been often and successfully applied in the practice of the League. It provides that

'1. Any war or threat of war, whether immediately affecting any of the members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary-General shall on the request of any member of the League forthwith summon a meeting of the Council.

'2. It is also declared to be the friendly right of each member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.'

The League has dealt with a large number of dangerous disputes under this Article. It was used with conspicuous success in 1925 on the occasion of the Greek invasion of Bulgarian territory, when the Council acted with great energy, issuing peremptory directions to the parties which secured the withdrawal of the Greek troops, and subsequently fixing the indemnity which Greece was to pay. The advantage of the Article lies in its elasticity, which enables the action taken under it to be suited to the circumstances, and

in the speed and freedom from formalities with which it can be brought into operation. It is particularly well adapted for preventive action in the early stages of a threatening dispute. It is true that the orders which the Council may issue under it are not legally binding on the parties, but until the Sino-Japanese dispute of 1931 most students of the League would have agreed that experience warranted the conclusion that 'the authority and prestige of the Council, the measures in reserve with which it may compel execution, and the force of public opinion make a decision wellnigh irresistible'.[1]

Unfortunately Japan's defiance and the hesitation of the Council in the face of it have shown that this statement is no longer true, at any rate where a Great Power is concerned. It appears also to have been assumed on that occasion, contrary to what was believed to have been established by the previous practice of the League, that unanimity (including the votes of the parties) is required for action under the Article. The arguments against this conclusion are the same as under Article 10, and it may be hoped that this question is not finally determined.

The Articles which follow, 12 to 17, contain a comprehensive scheme for dealing with disputes, which is independent of, and to some extent an alternative to, the provisions of Articles 10 or 11. These articles are more detailed in their drafting, and they prescribe specifically the action to be taken at each

[1] Conwell Evans, *The League Council in Action*, p. 60. This book, which appeared in 1929, is a valuable account of the history and importance of Article 11 up to that date.

successive stage in the handling of a dispute. We may say perhaps that Article 11 gives scope to the tact and discretion of the statesman; these articles rely on the technique of the lawyer.

By Article 12 the members 'agree that if there should arise between them any dispute likely to lead to a rupture', they will deal with it in one of two ways, by submitting it *either* to arbitration or judicial settlement, *or* to inquiry by the Council. If the former alternative is chosen, the award or the judicial decision must be given within a reasonable time; if the latter, the Council must report within six months; and the members agree not to 'resort to war' until three months after the award or the judicial decision or the report as the case may be.

In these provisions we have the first of the definite obligations against war undertaken by members of the League; there is to be no war until, at any rate, three months after one or other of the specified modes of peaceful procedure has had a fair trial. The underlying motive is clear; if a war can be delayed long enough for the issues to be debated in an impartial forum, it is very likely to be averted altogether. The exact extent of the obligation which the members of the League have undertaken is, however, unfortunately not quite clear, for the term 'resort to war' is ambiguous. 'War' is a technical term;[1] it is a condition of things which creates in law certain special rights and duties both for belligerent and for neutral

[1] See McNair, 'The Legal Meaning of War', *Grotius Society Transactions*, xi, p. 29; Eagleton, *The Attempt to define War*, International Conciliation pamphlets, 1933, p. 237.

states which they would not have if no war existed. Hence the law must have criteria for determining when 'war' exists, and though we have no authoritative text defining these criteria, they are for the most part reasonably well settled. It is certain that the mere resort to acts of force by one state against another does not amount to war; but that, at any rate as a general rule, one at least of the states concerned must have an *animus belligerendi*, that is to say, must *intend* to introduce the legal condition of war and must manifest that intention either by a declaration of war or in some other unambiguous way. For the present purpose, that of interpreting the term 'resort to war' in the Covenant, it is not strictly relevant to consider whether a 'state of war' may ever exist without an *animus belligerendi* on either side; but in the Sino-Japanese dispute of 1931 each party for different reasons was reluctant to recognize the hostilities which took place between them as having created a state of war, and it may be that hostilities on such a scale and so prolonged might legally have been treated by other states as amounting to war in the legal sense, had they chosen to do so. However that may be, the term 'resort to war' in the Covenant probably does not require that a 'state of war' in the legal sense must have been brought into existence. Both the history of its drafting and the context in which it is used suggest that the prohibition is aimed at acts of a certain kind, namely, at acts of armed force.[1] It can hardly have

[1] For a discussion of the arguments in favour of this view see Fischer Williams, *Some Aspects of the Covenant*, p. 292 et seq. See also

been intended that the obligations of other states which are to arise on a 'resort to war' should be dependent on an inquiry into the intention of the state taking violent action (which that state will naturally conceal, as far as possible), or still less that they should, as on any other view they might, depend upon whether or not the victim of such action has had the hardihood to treat it as having introduced a 'state of war'.

The question was raised in an acute form in 1923 by the action of Italy in bombarding Corfu by way of reprisal for the murder of the Italian General Tellini on Greek territory. The Council requested a Committee of Jurists to advise, not on the facts of this incident, but on the abstract question whether measures of coercion not intended to constitute acts of war are consistent with Articles 12 to 15 of the Covenant, and the reply was, in effect, that they might or might not be so.[1] The vagueness of this reply was probably due more to the political tension of the moment than to any real difficulty in the question; but, as Sir John Fischer Williams has pointed out, it is clear from the reply that the Jurists cannot have regarded the existence or non-existence of an *animus belligerendi* as the determining consideration.

Article 13 deals with the former of the two alternatives provided by Article 12, and indicates

Hindmarsh, *Force in Peace*, ch. vii, and an article by the present writer, 'International Law and Resort to Armed Force,' in *Cambridge L. J.* 1932.

[1] The text is printed in *B.Y.I.L.* 1924, p. 179.

the disputes which are considered 'generally suitable' for arbitration or judicial settlement. The disputes enumerated are the same as those in the optional clause of Article 36 of the Statute of the Court of International Justice, which has been quoted above.[1] The members agree to carry out an award or judgment in good faith, and not to resort to war against a member which complies therewith. In the event of failure to carry out an award or judgment, 'the Council shall propose what steps should be taken to give effect thereto'.

Article 14 provides for the establishment of the Permanent Court of International Justice, and its purpose has now been fulfilled.

Article 15 deals with the second of the two alternatives of Article 12, the submission of a dispute to the Council. Its first task is 'to endeavour to effect a settlement of the dispute'; for even though the parties themselves may have failed to agree, there is always a chance that friendly suggestion and advice from third parties may enable them to do so. If the Council succeeds in this attempt, it is to publish a statement of the facts and the terms of settlement, the object of this provision being presumably to reduce the chance that the Council, which is a political body, might unfairly coerce a weak power to agree to an unjust settlement. If, however, this attempt to get the parties to agree fails, the Council's next duty is 'to make and publish a report containing a statement of the facts of the dispute and the recommendations which are

[1] *Supra*, p. 215.

deemed just and proper in regard thereto'. It is important to appreciate the exact effect of this report if we would understand the true nature of the scheme. The Council has no power to dictate a settlement to the parties; its function is not an arbitral one. The effect of its report differs according as it is reached unanimously (the votes of the parties to the dispute being excluded) or by a majority vote; if it is unanimous, 'the members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report'; if it is a majority report, they 'reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice'. In other words, in neither case are the parties actually bound to accept the report, but a party which accepts a unanimous report is guaranteed against attack by the other, whereas a majority report does not carry this guarantee, and the parties are free to go to war, after the interval prescribed by Article 12, if they choose. The latter event is one of the so-called 'gaps in the Covenant', which it was the object of the abortive Geneva Protocol of 1924 to 'fill up'; but these are misleading metaphors, and it is difficult to provide exactly what shall be done in a case where opinion on the merits of the dispute will *ex hypothesi* be divided. In any case the whole matter will have been thrashed out in the Council debates, so that all the world will know the pros and cons; there will have been months of delay to enable passions to cool; and if nations are still resolved on war in such a case, no scheme

for preserving the peace, however theoretically perfect, is likely to hold them back.

In one case the Council is precluded from making any recommendation, for, by paragraph 8 of Article 15, 'If the dispute between the parties is claimed by one of them and is found by the Council to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.' This is an important limitation, but not perhaps so important as we might conclude when we remember that the class of disputes referred to is the very class that is apt to be most dangerous to peace; for before the Council can decide that a dispute falls within paragraph 8 it must have examined what the dispute is, and delay and publicity, which are the chief safeguards of peace, are therefore secured in this case as in others. Moreover, disputes of this class are not excluded from action under Article 11 mentioned above.

A controversy between Great Britain and France is instructive as illustrating both the meaning of this paragraph and the procedure of the Council under Article 15 in general. In 1921 France issued certain decrees, the effect of which was to impose French nationality, and consequently liability to military service, on certain British subjects in the French protectorates of Tunis and Morocco. Great Britain suggested arbitration under the Treaty of 1903, which France refused, and Great Britain thereupon submitted the dispute to the Council under Article 15

Before the Council France claimed that the matter was one within her domestic jurisdiction, and the Council asked the Permanent Court for an advisory opinion on this point. The opinion was in favour of Great Britain.[1] The paragraph, said the Court, contemplates 'certain matters which, though they may very closely concern the interests of more than one state, are not in principle regulated by international law. As regards such matters, each state is sole judge.' Whether a matter is or is not one of domestic jurisdiction, they said, is a relative question, depending upon the development of international relations, but 'in the present state of international law, questions of nationality are, in principle, within this reserved domain'. Such a question, however, may be removed from the domain of domestic jurisdiction into that of international law in various ways; for example, it was not, the Court said, a question of domestic jurisdiction but of international law to decide the extent of French jurisdiction over questions of nationality in a *protectorate*; and further, Great Britain relied on certain treaties whose validity was disputed by France, and this again raised a question of international law. The preliminary point arising under paragraph 8 was thus decided against the French contention, and the two parties then made an agreed settlement of the dispute, thus relieving the Council of the task of making its report and recommendations.

The Council may, if it chooses, and must, if requested by either party within fourteen days after the

[1] Series B, Advisory Opinion, no. 4.

submission to it of a dispute, refer a dispute to the Assembly, and in that event all the provisions of Articles 12 and 15 relating to the action and powers of the Council apply to the Assembly, with the difference that a report of the Assembly, if concurred in by the members of the Council and a majority of the other members of the League, has the same force as a unanimous report by the Council. It might be thought that the Assembly, on account of its large numbers, would be an unsuitable body for such a task, but when the Sino-Japanese dispute of 1931 was referred to it under this provision at China's request, this disadvantage was easily avoided by the use of Committees.

Article 16 contains the 'sanctions' of the Covenant, and it is desirable to set it out in full. It runs:

'1. Should any Member of the League resort to war in disregard of its covenants under Article 12, 13, or 15 it shall *ipso facto* be deemed to have committed an act of war against all other members of the League, which hereby undertake immediately to subject it to the severance of all trade and financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking state, and the prevention of all financial, commercial, or personal intercourse between the nationals of the covenant-breaking state and the nationals of any other state, whether a member of the League or not.

'2. It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval, or air force the members of the

League shall severally contribute to the armed forces to be used to protect the covenants of the League.

'3. The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimize the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

'4. Any member of the League which has violated any covenant of the League may be declared to be no longer a member of the League by a vote of the Council concurred in by the representatives of all the other members of the League represented thereon.'

The sanction of expulsion from the League contained in the fourth paragraph may be applied to the violation of *any* covenant of the League, and it presents no great difficulty. But the main interest of the Article lies in the provisions of the first two paragraphs, and these present formidable difficulties both of interpretation and application. These paragraphs take effect in the event of one kind of violation of the Covenant only, namely, if a member 'resorts to war' in disregard of its covenants under Article 12 (i.e. without submitting a dispute to either of the alternatives there mentioned, or without waiting three months after the award or judicial decision or report as the case may be), or Article 13 (i.e. against a

state which complies with an award or decision), or Article 15 (i.e. against a state which complies with the recommendations of a unanimous report of the Council). Thus the sanctions of the Covenant are directed against wars of a specially heinous and inexcusable kind, in effect against wars which are deliberately entered on in circumstances where an honourable settlement might have been possible. The Covenant does not 'legalize' other wars, as it has sometimes been said to do; it merely does not visit them with sanctions, and either Article 10 or 11 may be applicable to them though Article 16 is not. Moreover, the Covenant has now been re-enforced by the comprehensive provisions of the Pact of Paris, 1928, in Article 1 of which the signatory powers have declared that 'they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another'.

It will be seen that when Article 16 has been brought into operation by the happening of the event prescribed, the following results follow according to its terms: (*a*) The covenant-breaking state 'is deemed to have committed an act of war against all other members of the League'. (*b*) The other members are bound immediately to subject the covenant-breaking state to an extreme form of boycott, financial, commercial, and personal, and to enforce this boycott even against non-members of the League. (*c*) They are not bound to resort to military measures, but the Council has a duty to 'recommend' what forces they should

severally contribute. But a literal application of these provisions would lead to results so extravagant and so obviously contrary to the spirit of the Covenant that it has been recognized that they must be interpreted with some degree of latitude, though in this case the word 'interpretation' is something of a euphemism.

In 1921 the Assembly adopted certain Resolutions[1] which it recommended to the Council and to members of the League as 'rules of guidance' in the application of Article 16, pending an amendment of its provisions, which has not yet taken place; and though these Resolutions have only a moral authority, that authority is a high one, and in the only case in which the Article has yet been brought into operation, namely, against Italy in 1935, the action taken was, in effect, based on these Resolutions rather than on the literal text of the Article. The Resolutions point out that the unilateral act of the defaulting state cannot create a state of war; it merely entitles the other members of the League to resort to acts of war or to declare themselves in a state of war with the covenant-breaking state; but it is in accordance with the spirit of the Covenant that the League should attempt, at least at the outset, to avoid war, and to restore peace by economic pressure. It is the duty of each member to decide for itself whether a breach of the Covenant has been committed; but the Council should meet to consider all breaches or threatened breaches. If the Council is of opinion that a breach has been committed it should notify all members of the League and invite

[1] Text in League Publication, A. 14. 1927, V, at p. 42.

them to take action, and it should recommend a date upon which the economic pressure is to begin. It may also recommend that the execution of special measures should be entrusted to certain states, and it may postpone, wholly or partially, the application of the sanctions by certain states so far as may be desirable for the success of the common plan of action or for reducing the losses which the sanctions would entail for such states. Since the appropriate measures cannot be decided in detail beforehand the Council is to recommend a plan for joint action, involving measures of increasing stringency if the application of pressure has to be prolonged, and it is to endeavour to secure the co-operation of non-members of the League. Perhaps the most important of the glosses which these Resolutions have put on the text of the Article are these: while maintaining the right of each member to decide for itself whether an occasion for sanctions has arisen, they emphasize the collective nature of the action to be taken and provide machinery, which the Article does not, for its co-ordination; and they contemplate the grading and progressive application of the measures decided upon, and not, as the Article seems to do, an immediate resort to the maximum of pressure.

Article 17 provides for disputes with, or between, states not members of the League. Such a state is to be invited to accept the obligations of membership of the League for the purposes of the dispute, and, if it accepts, Articles 12 to 16 are to apply; if it refuses and resorts to war against a member of the League,

Article 16 is to apply; if both parties are non-members and both refuse, the Council is to take such measures and make such recommendations as will prevent hostilities and settle the dispute. This Article was framed on the assumption that no important state would remain outside the League, and it has not yet been applied.

The League scheme of settlement has now been tested during fifteen difficult years. It has many successes to its credit; it has also had some failures, but whenever it has failed, it is practically certain that the situation would have been even worse if there had been no League, It failed to avert the rape of Manchuria in 1931, and the attack on Abyssinia in 1935; but it is no light thing that in each of these crises a Great Power was constrained to recognize its accountability to the rest of the world, to defend its conduct through weeks of protracted debate, and to suffer a public and practically unanimous condemnation for violation of its pledged word.

We know now that if a state is firmly resolved to go to war, in preference to an honourable settlement of its dispute, the League scheme cannot always avert it; but this is not the common case. In ordinary circumstances we are entitled to assume that the vast majority of people in every state never want a war unless they can be persuaded that it is inevitable, and that governments practically never want one if they can be shown how to avoid it without a too serious injury to real or supposed national interests, and without the loss of their own prestige. The practical aim of

peace-preserving machinery is to secure that the deterrent forces, which are always present when war is threatened, are allowed the fullest scope; that a nation is not rushed into war by an active minority, through the issues being misrepresented, or through the fear of losing the advantage of the first blow by even a slight delay. The League scheme probably does this as effectively as any human contrivance can; it makes war difficult and peace easy.

That part of the scheme which aims at restoring, when preventive measures have failed to preserve, the peace, is now being tested for the first time. It seems to be already reasonably evident that in a clear case of violation of the Covenant, such as that of Italy in 1935, the right of each state individually to decide whether an occasion for sanctions has arisen is no insuperable defect; it is high testimony to the good faith of nations that almost every member of the League has given an honest verdict on that point. It seems evident too that the scheme can be worked, if not in every conceivable case, at any rate in one that is far from easy, effectively and without too great cost to the participating states. What is not yet evident is whether the loyalty of some of the states concerned, in particular of Great Britain and France, is sufficiently sincere for them to desire more than a formal demonstration of disapproval of the threatened dismemberment of one member of the League by another.

IX

INTERNATIONAL LAW AND RESORT TO FORCE

§ 1. *Intervention.*

THIS word is often used quite generally to denote almost any act of interference by one state in the affairs of another; but in a more special sense it is confined to acts of interference either in the domestic or the foreign affairs of another state which violate that state's independence. A mere tender of advice by one state to another about some matter within the competence of the latter to decide for itself, would not be an intervention in this sense, though it might be popularly so described; the interference must take an imperative form; it must either be forcible or backed by the threat of force.

Neither the practice of states in their relations with one another, nor the opinions of writers on international law, afford any clear answer to the question when an intervention in this sense is legitimate. Practice on the matter has been determined more often by political motives than by legal principles. Moreover, the extremest form of intervention is war, and until recently, modern international law, as we have seen, has not attempted to distinguish between legal and illegal occasions of making war. As long as this was the attitude of the law to war, it is not surprising that there should have been little agreement

on the principles which regulated the less extreme measures of coercion by which one state might assume to dictate a certain course of action to another. For there was a certain unreality in attempting to formulate a law of intervention and at the same time admitting, as until recently it was necessary to admit, that a state might go to war for any cause or for no cause at all without any breach of law. How easily such a law could be circumvented was shown by Great Britain and Germany in 1901, for when the United States objected to certain measures which they proposed to take against Venezuela under the guise of a 'pacific blockade', they regularized the matter by acknowledging a state of war to exist.[1] An effective law of intervention therefore is intimately related to the wider problem of the effective limitation of the liberty of states to go to war.

Another difficulty of this branch of the law arises from the present predominantly individualist basis of international law. The independence of states clearly obliges us to regard the strictly legal grounds of intervention as exceptions to a general rule of non-intervention. But it will be difficult to limit interventions in practice to those for which a legal justification can be pleaded, until it is also possible for the law to restrain some of the anti-social uses which states at present are free to make of their independence. At present an intervention, which we are forced to stigmatize as illegal, may even deserve moral approval, as did possibly some of the interventions which took

[1] Cf. Moore, *International Law Digests*, vol. vii, p. 140.

place in the affairs of the former Turkish Empire. It is probably the realization of this possible contradiction between law and morality that leads some writers to regard humanitarian reasons as a legal justification for intervention; but it involves a radical departure from the present basis of international law to maintain that a state's treatment of its own subjects is, in the absence of any treaty protection, anything but a domestic matter which it may decide at its own discretion. It seems necessary, therefore, to admit that no intervention, apart from interventions taking place under a treaty giving such a right to the intervening state, can be strictly legal except one which is directed against a state which, either by commission or omission, is guilty of an international wrong. 'Intervention is thus not so much a right, as the sanction of the rights of states. It constitutes for a state a means of assuring the fulfilment by other states of the duties which they owe to it.'[1]

In strict theory the legality of an intervention by many states acting together must be judged by the same tests as that of an intervention by a single state, but politically and even morally the distinction may be vital. On many occasions in the nineteenth century the Great Powers intervened, by action which technically and legally involved a usurpation of power, in order to impose the settlement of a question which threatened the peace of Europe;[2] and to-day the Covenant of the League, which, it must be remembered,

[1] Fauchille, *Droit International*, vol. i, p. 562.

[2] Cf. *supra*, pp. 67–8.

was drafted at a time when it was assumed that all the Great Powers would be members, notably in Articles 10, 11, 17, seems to claim for the League a right similar to that formerly arrogated by the Powers. In the absence of effective legislative procedure for altering international conditions, such extra-legal action by states which are in a position to take it effectively may sometimes be the only practicable alternative to war, and the provisions of the Covenant are at least an advance upon the earlier practice. But in so far as they contemplate action against non-member states they are from a legal point of view, as Professor Redslob has described them, at most 'un principe d'avenir qui porte en lui une force conquérante. L'article 17 devance le droit actuel.'[1]

The strictly legal occasions of an intervention may conveniently be brought under three heads, self-defence, reprisals, and the exercise of a treaty right. The two former require detailed consideration, but it will suffice to give one illustration of the last. By the Treaty of Havana, of 1903, Cuba agreed that the United States might intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and in certain other events. This right was exercised on more than one occasion by the United States, but in 1934 it was abrogated by a new treaty.

The feeling that existing international law does not always adequately protect what states regard as their

[1] *Théorie de la Société des Nations*, p. 116.

own reasonable interests gives some measure of moral justification to the maintenance by some of the more powerful among them of policies in which they deliberately avow their intention to intervene in the affairs of other states in certain events which they regard as threatening their national security or interests. The Monroe doctrine of the United States is an example of such a policy. President Monroe's famous message to Congress in 1823 laid down two important principles of American policy: (1) that the American Continents were henceforth not to be considered as subjects for future colonization by European powers, and (2) that the United States would not take part in the wars or affairs of Europe, but would regard the interposition of a European state in the affairs of any American state as an unfriendly act. As a matter of history the first of these principles was directed at possible encroachments by Russia in the north-west, and the second was a warning to the Holy Alliance, which was then meditating action to restore the authority of Spain in South America.

The subsequent history of the Monroe doctrine covers a large part of the history of American foreign policy in the last hundred years. It has come to include a claim by the United States to forbid not merely any act violating the independence of an American state, but the acquisition of American territory by a non-American state even by friendly means. Occasionally, it has been pushed even farther, as when Secretary of State Olney, intervening in the boundary dispute between Great Britain and Venezuela in 1895, declared

that the United States was 'practically sovereign', and 'her fiat law' on the American Continent. From being a claim to veto European intervention, it has been expanded so as to assert a right of American intervention in any conflict between an American and a non-American state. At times the development of something like an 'economic Monroe doctrine' has seemed probable, for the United States has shown a tendency to resent the acquisition even of economic influence in states on the American Continent by any but her own nationals. Recent Administrations in the United States, however, have shown themselves desirous of removing the more extravagant of the corollaries which the doctrine has been supposed to involve for American foreign policy.

The Monroe doctrine is a policy which the United States has followed in her own interest more or less consistently for more than a century, and in itself is not contrary to international law, though possible applications of it might easily be so. But it certainly is not a *rule* of international law. It is comparable to policies such as the 'balance of power' in Europe, or the British policies of maintaining the independence of Belgium or the security of our sea-routes to the East, or the recent Japanese claim to something like a paramount influence over developments in the Far East. Apart from other objections, it is impossible to regard as a rule of law a doctrine which the United States claims the sole right to interpret, which she interprets in different senses at different times, and which she applies only as and when she chooses.

Nor is the Doctrine, as Article 21[1] of the Covenant describes it, a 'regional understanding', for the other states of the 'region' concerned, that is to say, the Continent of America, have never been parties to it and indeed have often deeply resented it.

§ 2. *Self-defence.*

A state, like an individual, may protect itself against an attack, actual or threatened. The principle of self-defence is clear, though its application to specific facts may often be a matter of difficulty. But a particularly clear example of an intervention justified on this ground is afforded by the incident of the steamer *Caroline* in 1837. During an insurrection in Canada the *Caroline* was used to transport men and materials for the rebels from American territory into Canada across the Niagara river. The American Government had shown itself unable or unwilling to prevent this traffic, and in these circumstances a body of Canadian militia crossed the Niagara, and, after a scuffle in which some American citizens were killed, sent the *Caroline* adrift over the Falls. In the controversy that followed, the United States did not deny that circumstances were conceivable which would justify this action, and Great Britain for her part admitted the necessity of showing circumstances of extreme urgency. They differed only on the question whether the facts

[1] 'Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace.'

brought the case within the exceptional principle. A recent American writer has summed up the incident by saying that 'the British force did that which the United States itself would have done, had it possessed the means and disposition to perform its duty'.[1]

The formulation of the principle of self-defence in this case by the American Secretary of State, Daniel Webster, has met with general acceptance.[2] There must be shown, he said, 'a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation'; and, further, the action taken must involve 'nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it'.

The second of these propositions is as important as the first and more likely to be overlooked, for there is a natural temptation, when force has been resorted to, to continue its use after the needs of defence have been fairly met. Thus whatever may be the true view of the initial use of force by the Japanese in Manchuria in 1931,[3] it would be difficult to regard their later operations as measures of defence.

But many writers on international law are not con-

[1] Hyde, *International Law*, vol. i, p. 107.

[2] See, however, Westlake's criticism of the words 'leaving no moment for deliberation', in *International Law*, Part 1, p. 300.

[3] On this the verdict of the Lytton Commission was that the operations were *not* measures of legitimate self-defence, but that the officers on the spot may conceivably have thought that they were. See the Report of the Commission, p. 71.

tent to admit the existence of a right of self-defence in this strictly limited sense. They assert the existence of a much wider right, that of self-preservation. In writers who accept the doctrine of the 'fundamental rights' of states, this alleged right generally takes precedence of all others; and even a writer generally so moderate in his views as the late W. E. Hall described it in these extravagant terms: 'Even with individuals living in well-ordered communities the right of self-preservation is absolute in the last resort. *A fortiori* it is so with states, which have in all cases to protect themselves.'[1] 'In the last resort almost the whole of the duties of states are subordinated to the right of self-preservation.'[2] Such statements would destroy the imperative character of any system of law of which they were true, for they make all obligation to observe the law merely conditional; and there is hardly any act of international lawlessness which, taken literally, they would not excuse. If, for example, on 2nd August 1914, it was Germany's right to consider only her own preservation, as under this doctrine it was, then she had a legal justification for her attack on Belgian neutrality, and it is irrelevant to inquire whether Belgium was in any way responsible for the danger in which Germany found herself. Fortunately, we are not bound to admit that international law has admitted so immoral a principle as these unguarded statements would imply. The supposed analogy with national law, on which they generally seem to be based, is quite unsound.

[1] *International Law*, 8th ed., p. 65.

[2] Ibid., p. 322.

Lord Bacon once imagined the case of two men who seized the same plank in a shipwreck, and because the plank could not bear the weight of both, one pushed the other off and he was drowned. There is no doubt that in English law that action would be murder. Indeed, when two men and a boy were cast away at sea in an open boat, and the men, after their food and water had been exhausted for many days, killed and ate the boy, they were actually convicted of murder, although the jury found that in all probability all three would have died unless one had been killed for the others to eat. (*R.* v. *Dudley and Stephens* (1884) 14 Q.B.D. 273.) An American case, *United States* v. *Holmes* (1 Wallace Junior, 1) is to the same effect. The ship *William Brown* struck an iceberg, and some of the crew and passengers took to the boats. The prisoner helped to throw overboard some of the passengers, in order to lighten the boat, which was overloaded and leaking. He was convicted of murder. In both these cases a right of self-preservation, if any such right were known to the law, would have justified the acts committed, but it is equally clear that in neither were the acts truly defensive, for they were directed against persons from whom danger was not even apprehended. National law, indeed, is so far from recognizing an absolute right in the individual to preserve himself at all costs, that it sometimes even places on him, without any fault of his own, a legal duty to sacrifice his own life; compulsory military service is an obvious case in point.

The truth is that self-preservation is not a legal

right but an instinct, and no doubt when this instinct comes into conflict with legal duty either in a state or an individual, it often happens that the instinct prevails over the duty. But we ought not to argue, because states or individuals are likely to behave in a certain way in certain circumstances, that therefore they have a right to behave in that way. Strong temptation may effect our judgment of the moral blame which attaches to a breach of the law, but no self-respecting system can admit that it makes breaches of the law legal; and the credit of international law has more to gain by the candid admission of breaches of it when they occur, than by attempting to throw a cloak of legality over them.

Self-defence, properly understood, is a legal right, and as with other legal rights the question whether a specific state of facts warrants its exercise is a legal question. It is not a question on which a state is entitled, in any special sense, to be a judge in its own cause. In one sense a state in international law may always be a judge in its own cause, for, in the absence of a treaty obligation, it is not compulsory for a state to submit its conduct to the judgment of any international tribunal. But this is a loose way of speaking. A state which refuses to submit its case does not become a 'judge'; it merely blocks the channels of due process of law, as, owing to the defective organization of international justice, it is still able to do. This is a defect of general application in international law, which applies, but not in any special sense, to a disputed case of self-defence. There is, however, another circum-

stance which gives a certain plausibility to the common claim that every state is competent to decide for itself whether a necessity for self-defence has arisen. It is, or may be, of the nature of the emergency which seems to justify defensive action that action, if it is to be effective, must be immediate. This is equally true of defensive action by an individual. To wait for authority to act from any outside body may well mean disaster, either for a state or an individual, and either may have to decide *in the first instance* whether or in what measure the occasion calls for defensive action. With the individual, under any civilized system of law, this initial decision is not final; it may be reviewed later by the law in the light of all the relevant circumstances. There is no reason to believe that the case is different with a state, except for the possible difficulty, just referred to, of procuring the submission of the question to judicial review; and fortunately this conclusion does not depend on *a priori* argument. For the practice of states decisively rejects the view that a state need only declare its own action to be defensive for that action to become defensive as a matter of law. Japan, for example, claimed that her action in Manchuria in 1931 was defensive, but neither Japan herself nor other states regarded this claim as concluding the matter in law. On the contrary, the Assembly of the League, Japan alone dissenting, after a discussion which on any other view would have been meaningless and irrelevant, came to the opposite conclusion, and it is clear that the defensive or non-defensive character of any state's action is universally

regarded as a question capable of determination by an objective examination of the relevant facts.

§ 3. *Reprisals.*

'Reprisals' is a word with a long history, and modern writers are not agreed on the meaning which should be given to it to-day. Literally and historically it denotes the seizing of property or persons by way of retaliation, and formerly it was not uncommon for a state to issue 'letters of marque' to one of its own subjects, who had met with a denial of justice in another state, authorizing him to redress the wrong for himself by forcible action, such as the seizure of the property of subjects of the delinquent state. The practice was called 'special' reprisals, but it has long been obsolete. Reprisals when they are taken to-day are taken by a state, but some writers would still limit the word to acts of taking or withholding the property of a foreign state or its nationals, for example, by an embargo, whilst others would abandon the historical associations and use it to denote any kind of coercive action not amounting to war whereby a state attempts to secure satisfaction from another for some wrong which the latter has committed against it. Whether or not we use the word 'reprisals' in this wider sense, the point of chief interest is to examine the limits which the law sets to the forms of self-help to which states may resort in order to redress a wrong, for so long as the system does not provide an internationally organized machinery for coercing a delinquent state,

it is clear that self-help cannot be altogether eliminated.

Measures which have been commonly used in the past include an embargo on the ships of the offending state which are found in the waters of the other, seizure of a port, or of ships at sea, or of the property of nationals, and pacific blockade. The last-mentioned mode of pressure has been frequently used by naval powers during the last hundred years, and it so happens that frequently the victim has been Greece, who is specially sensitive to this form of pressure for geographical and economic reasons. The question of chief legal interest about it has been the doubt whether a blockade of this kind could be legally enforced against the ships of third states, that is to say, of states other than the blockading and blockaded states. In war, belligerents and neutrals have reciprocal rights and duties; but if a blockading state does not choose to regard itself as a belligerent, it is difficult to see what right it has to impose on other states or their subjects obligations which only attach to neutrals in a war. That it has no such right is now generally accepted. Practice on the matter, however, has varied; and many blockades, purporting to be pacific and not hostile, have been enforced against the ships of third states. M. Fauchille justly says of pacific blockade that at bottom it is nothing but an act of war; in resorting to it the strong maritime powers do not seek to avoid war *in se*, but only the inconveniences and the duties that war entails.[1]

[1] *Traité de droit international public*, tome i, part iii. p. 710.

The conditions of a legal resort to reprisals were discussed in an arbitral award[1] in 1928, and certain principles, which have previously depended for their authority on the arguments of text-writers, were accepted and applied by the tribunal. In 1915, while Portugal was still neutral in the Great War, an incident took place at Naulilaa, a Portuguese post on the frontier of Angola and the then German South-West Africa, in which three Germans were killed. The Court was satisfied on the evidence that the incident arose out of a pure misunderstanding. The Germans, however, as a measure of reprisals, sent an expedition into Portuguese territory, attacked several frontier posts, and drove out the garrison from Naulilaa. In the regions which the Portuguese were thus compelled to evacuate a native rising took place, and its suppression necessitated a considerable expedition by the Portuguese. The arbitrators laid down three conditions of the legitimacy of reprisals: (*a*) there must have been an illegal act on the part of the other state; (*b*) they must be preceded by a request for redress of the wrong, for the necessity of resorting to force cannot be established if the possibility of obtaining redress by other means is not even explored; and (*c*) the measures adopted must not be excessive, in the sense of being out of all proportion to the provocation received. In this case Portugal had committed no illegal act; Germany had made no request for redress;

[1] *Portugal* v. *Germany* (The Naulilaa case), *Annual Digest*, 1927–8, case no. 360. The full text is printed in *Revue de droit international*, 1929, p. 255.

and the disproportion between the German action and its provocation was evident. The award was therefore given in favour of Portugal.

The legitimacy of reprisals has been further and drastically limited by conventional law. One such limitation, perhaps no longer of great importance in view of the more far-reaching provisions of the Covenant and the Pact of Paris, arose out of the so-called *Drago doctrine*. In 1902, when Great Britain and Germany were conducting a pacific blockade of Venezuela in the interest of her British and German creditors, M. Drago, then foreign minister of the Argentine Republic, put forward the contention that the failure of a state to pay its debts does not justify the use of force against it. There may have been good reasons even at that date from a domestic point of view against employing the British fleet as a debt-collecting agency on behalf of British subjects who had made risky investments abroad, but there was little authority in international law for M. Drago's contention. It led, however, in 1907 to a Hague Convention (No. II) 'respecting the limitation of the employment of force for the recovery of contract debts', whereby the signatory states agreed not to use force for that purpose unless, in effect, the debtor state had refused to submit to arbitration, or having agreed to do so, had failed to obey the award.

The effect of the Covenant on the law relating to Reprisals depends partly on a question which has already been discussed,[1] the meaning of the term

[1] *Supra*, p. 233.

'resort to war', for if a member of the League 'resorts to war', it cannot take its action outside the provision of the Covenant by describing it as 'reprisals'. But apart from the limitation which these words of the Covenant probably place on the form that reprisals may take, it must be borne in mind that the members of the League have not only undertaken certain negative obligations against 'war', but have also bound themselves in Article 12 to take certain positive action which is designed to lead to a peaceful settlement of their differences. It is a reasonable inference from this positive undertaking to say that it implies that the members will not simultaneously act in such a way as to render it illusory; that is to say, that they will not, while the prescribed procedure is pursuing its course, resort to action of which the natural effect must be to provoke an immediate rupture, and so to defeat the chance of the procedure of the Article leading to a successful issue. Many of the acts which have been used as reprisals in the past, certainly all forms of violent reprisals, are likely to have this effect, and on this view they must be regarded as forbidden by the Covenant.[1]

Finally, the limiting effect of Article 2 of the Pact of Paris, 1928, is even more comprehensive, for thereby

'The High Contracting Parties agree that the settlement

[1] See an article 'L'Interprétation du Pacte au lendemain du différend italo-grec', in *Revue de droit international et de législation comparée*, by Professor Charles de Visscher, who was himself one of the jurists consulted by the Council after that dispute.

or solution of all disputes or conflicts, of whatever nature or of whatever origin they may be, which may arise between them, shall never be sought except by pacific means.'

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